VOLUME XXXVII NUMBER 1

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Massachusetts Law Quarterly

APRIL, 1952

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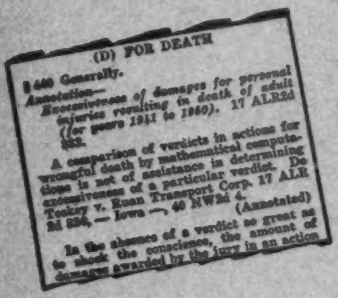
IS IT EASY TO FIND?


(D) FOR DEATH

§ 640 Generally.

Annotation—

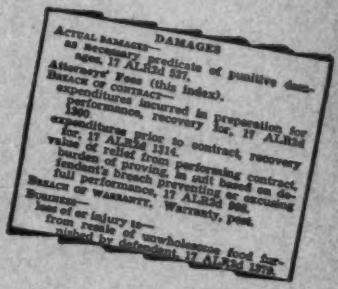
Excessiveness of damages for personal injuries resulting in death of adult (for years 1941 to 1960). 17 ALR2d 382.

A comparison of verdicts in actions for wrongful death by mathematical computation is not of assistance in determining excessiveness of a particular verdict. De Tenkey v. Ruan Transport Corp. 17 ALR 2d 826, — Iowa —, 40 NW2d 4.

In the absence of a verdict so great as to shock the conscience, the amount of damages awarded by the jury in an action

(Annotated)

FROM THE DIGEST TO ALR 2d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FRIDAY, JUNE 6

JAMES M. ROSENTHAL, *Presiding*

2:00 P.M. "What's New in Probate Law and Practice"
Guy Newhall, author of "Settlement of Estates"
Walter H. Gilday, author of "Manual of Probate Procedure"

3:30 P.M. Ladies Tea

8:00 P.M. Brockton Elementary School Boys' Choir directed by Miss Alice T. McElhiney
Selections by the School House Five Plus Five directed by George L. Wainwright
Dancing—Orchestra

SATURDAY, JUNE 7

MISS INEZ DIPERSIO, *Presiding*

10:30 A.M. "Federal Tort Act"
Philip T. Jones, Asst. United States Attorney

11:00 A.M. "Federal Practice and Procedure"
John A. Canavan, Clerk of the United States District Court for the District of Massachusetts

11:30 A.M. "Changes in Law Enacted by the Present Legislature"
Walter F. Costello

2:30 P.M. Annual Meeting of the Massachusetts Bar Association*

3:30 P.M. Special Ladies Program for wives and guests

7:00 P.M. INSTITUTE DINNER
Toastmaster—Samuel P. Sears, President of the Massachusetts Bar Association
Remarks by Honorable Stanley E. Qua, Chief Justice of the Supreme Judicial Court
Guest Speaker—Honorable Frederick G. Katzmann
Dancing—Orchestra

GEORGE F. GARRITY, *Chairman*

Institute, 1952.

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* Notice of the Annual Meeting with report of the nominating committee was mailed to all members only May 6, 1952.—F. W. Grinnell, Sec.

THE ORGANIZED BAR IN MASSACHUSETTS

By DEAN LOWELL S. NICHOLSON

The Survey of the Legal Profession is glad to announce that this interesting report is being printed and will shortly be distributed to all Massachusetts lawyers by The Standard Diary Company which is the publisher of the *Massachusetts Lawyer's Diary.*

If you are a member of the bar but your name does not appear in the 1952 edition of the *Massachusetts Lawyer's Diary,* you can obtain a copy of Dean Nicholson's report by writing to The Standard Diary Company, 26 Blackstone Street, Cambridge 39, Mass.

REQUEST FOR COPIES OF "QUARTERLY" FOR OCTOBER 1951

We still need copies of the October issue owing to inadvertent mailing of two copies to many members. We thank those members who have sent in copies and hope for more from those who can spare them.—Editor.

CHANGES IN THE JUDICIAL COUNCIL

Hon. Wilfred J. Paquet, vice-chairman, resigned from the Council on his appointment to the Superior Court. Edward O. Proctor of Newton was appointed by the Governor as a member of the Council. Frederic J. Muldoon, a member since 1938, was chosen vice-chairman of the Council.

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Income on Law Society Scholarship Fund		124.34	
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Suspense		353.25	$1,961.24
Total Receipts			$36,415.33
DISBURSEMENTS			
Central Office Expense		$6,324.52	
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Secretary's Expense		500.00	
Mass. Law Quarterly		4,266.93	
Mid-Winter Meeting net expense		1,160.74	
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General Expense		30.25	
Law Institute, net expense		1,085.79	
Old Age Petition		739.75	
Cenedella-Derham Investigation		1,500.00	
Total Disbursements			$20,823.84
Balance on hand December 31, 1951			$15,591.49
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Law Society Scholarship Fund,			
Principal (invested)		4,635.00	
Income		124.34	
		$15,591.49	

We have examined the books and accounts of the Treasurer for the year 1951 and certify that they are correct.

February 27, 1952. Reuben Hall, Thomas M. A. Higgins, *Auditors.*

PRESIDENTIAL POWERS

Enough Clearance?

From The Christian Science Monitor, April 26, 1952

A Little History

1808—Hon. William Johnson held illegal an executive order of President Thomas Jefferson.

1812—Hon. Joseph Story (sitting in Boston) held illegal an executive order of President James Madison.
(See Schooner Orono, 1 Gallison, 137 and Charles Warren in 7 M.L.Q. No. 2, Dec. 1922, 19-22.)

1952—Hon. David A. Pine held illegal an executive order of President Truman. (See newspapers of April 30, 1952.)

From President George Washington's "Farewell Address"

"If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit wnich the use can at any time yield."

Compare 27 M.L.Q. No. 2, 1942, pp. 20-23.

Maybe He Rubbed Too Hard

—Hutton, in the Philadelphia Inquirer

Even a New Doormat

—Shanks, in The Buffalo News

THE FEDERALIST

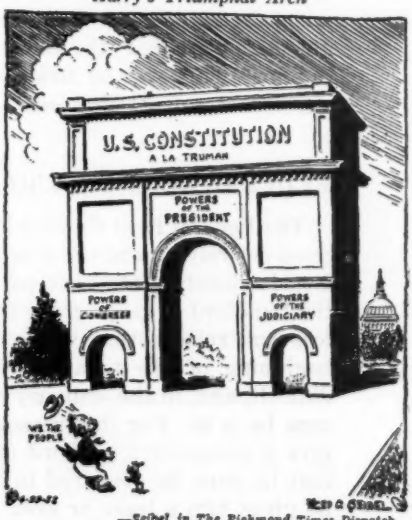
No. LI

February 8, 1788

In *The Federalist*, Number LI (February 8, 1788), Alexander Hamilton wrote the following:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government, which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.

Harry's Triumphal Arch



—Seibel, in The Richmond Times-Dispatch

FEDERAL RENT CONTROL AND SUMMARY PROCESS IN MASSACHUSETTS

By FANEUIL ADAMS

The October "Quarterly" contained an article by Reuben Hall on "Price Control" and the December issue one by John W. Morgan on "Wage Control."

For general practitioners throughout the commonwealth "Rent Control" may, perhaps, cause the more frequent headaches. The first of the recent series of meetings for "the continuing education" of the bar sponsored by the Massachusetts, and other, bar associations under the direction of Dean Lowell Nicholson, was devoted to practical problems under the law relating to dealings with land. It was, perhaps, the largest and most attentive working session of lawyers that we remember—about 500 from all over the commonwealth sitting in continuous session from 10:00 a.m. to 6:00 p.m.

Mr. Adams, who with Charles Y. Wadsworth, produced the 4th edition of Hall's "Landlord and Tenant," led the discussion of that subject. In the hope and belief that it will prove a helpful reminder, or warning, of practical pitfalls, we submit to the entire bar the substance of the discussion by Mr. Adams. This will be followed in our next issue by his discussion of leasing problems. Editor.

FEDERAL RENT CONTROL—

The Federal Rent Control law not only modifies, but in most cases entirely upsets, the accepted law on Landlord and Tenant. Besides limiting the rent payable in certain cases it requires the Landlord to keep up the premises by giving the same services and repairs that were in fact, not in law, given at the beginning of the tenancy. Further it is made much more difficult, and, in the ordinary case impossible, to evict a tenant once he is in. For this reason the very first advice you must give a prospective landlord of a dwelling unit is to warn him that he must be prepared to live with a tenant indefinitely if he gives him a lease or even a tenancy at will, and that it is dangerous and often fatal to give someone a lease on his promise he will get out in any given time. On the other hand

a tenant has a much greater assurance of a long tenancy at a reasonable rent than he ever had before.

This is not the place to go into constitutional questions, but it is interesting to note that just this year a landlord who had made a valid lease at $125.00 per month during a period when the property was not under control could not charge more than the maximum rent determined of $55.00 when the property was re-controlled. Furthermore it was held that only the amount of rent in the lease was affected and that the lease was otherwise in full force and effect and a tenancy at will was not created.[1]

This whole subject is probably better understood now than it formerly was, but I am going to run through the salient points briefly, as at one time it was extremely difficult to have readily available the current regulations. Some regulations on which important matters depended existed only in obscure services or publications, and often only one copy could be found in the Rent Control Office.

I. WHAT IS CONTROLLED (geographically)

You may get the same surprise that I did if you happen to have a case in parts of Plymouth County for example, and advise a client that he would have to think about Rent Control. Originally it was all controlled, but now there are only a few towns in that county still under control. So be sure in the first place that the particular community in which you are interested is not decontrolled. It will save you time. At present all of Suffolk, Middlesex, Essex, Norfolk, Hampden, Hampshire, Worcester, Berkshire and Bristol counties are under control, but only parts of Plymouth, Barnstable, one city (Greenfield) in Franklin, and none of the "independent states"—County of Dukes and Nantucket—are under the ban.

II. WHAT IS CONTROLLED (accommodations)

The most important distinction, of course, is that no commercial properties are controlled anywhere, but there are also a number of types of dwelling units that are free. Generally speaking, any house or apartment where people live is controlled, but here are various important exceptions:

[1] Dunlap v. Navarro, 1951 A. S. 91.

1. Hotels (in New England).
2. Motor courts and tourist homes serving transients only.
3. New housing (whether houses or apartments) or housing converted from a non-housing use and completed after Feb. 1, 1947. There are certain exceptions for veterans' housing, but, by and large, all such new units are outside the law. Notice, however, that this does not include new units created by conversion of a present housing unit, such as making several apartments where there was only one before. In this case they are decontrolled if completed between Feb. 1, 1947 and April 1, 1949, but are under control if completed after that date. If you have a new unit you will therefore, have to find out for certain whether it is really new or converted from a non-housing use, or on the other hand a mere splitup of existing accommodations, and if the latter, when it was completed.
4. Resort Housing. Summer and winter resort houses, so important in many parts of New England, are not under control if rented for the proper season. But they are still controlled if rented for the year round or the off season. However, the establishment of an off season rent does not prevent charging anything you can get for the summer or winter as the case may be.[2]
5. Other, perhaps less important exceptions, cover farming tenants, service employees, rooming houses (covered, however, by special regulations), non-housekeeping apartments in a landlord's house if occupied by not more than two tenants and certain leases of whole buildings where the tenant subleases.

I give these in some detail, not because I expect you necessarily to remember them, but to point out the complexities and the necessity in every case of examining the particular facts and appropriate law and regulations, to be sure that the premises you are dealing with are controlled at all.

If you find that they are controlled you will then have a new set of worries, whether you are representing a landlord wishing to have the rent raised or evict a tenant, or a tenant resisting such acting or asking that the services be kept up. As you know, all controlled accommodations must be registered. I venture to say that almost all of you will get a case

[2] Kaufman v. Fistel, 323 Mass. 422.

on one side or the other where you will wish to go ahead happily with your proceeding, whatever it is, and find that the accommodation has not in fact been registered, and, if you are not careful, you may very well find this out after you have started and you will have to go back to the beginning. This may be so for a variety of reasons—lack of knowledge or desire to follow the law—converted apartments that are controlled, although the landlord may think they are not—or, perhaps more frequently, accommodations that were not originally rented but either not used or used by the family until a recent period. Fortunately the authorities do not seem to object in practice to late registration, so this can usually be cured, but be sure you have either a past or present registration before you go ahead.

MAXIMUM RENTS

What is the maximum rent in any given case is not always an easy question. Originally they were the rents in effect March 1, 1942. Under the present law they are the rents in effect June 30, 1947, except for adjustments to which I will refer, but it is much the same, as not too many increases were given during this period. For controlled houses first rented since June 30, 1947, the maximum rent is the first rent. The unit must be registered and Housing Director has the opportunity to decrease it if he thinks it too high.

The most important adjustment is the general one, recently put into effect, whereby a landlord is allowed to charge 20% above the June 30, 1947 figure, provided the necessary documents are filed and provided he certifies all services are being kept up. Notice, however, that in a house first rented after that date it is not 20% above the rent, but 20% of the fair rent on June 30, 1947, that is allowed.

The 20% raise, moreover, is 20% of the sum of the 1947 rent plus increases already allowed, if any, for capital improvements and additions to services, but is only 20% of the basic rent where there has already been an increase under the old 15% law, under any special increase allowed in the particular community or under the fair net operating income test. In other words, the 20% increase is over the basic rent plus real

improvements, not 20% over the basic rent, as it may have been increased by purely financial relief to the landlord.

Aside from their general raises, allowed to everyone without proof of hardship, there are a number of other circumstance where the rent may be raised or decreased under special conditions, provided you can persuade the rent authorities of justification for that course. A petition must be filed. In general they are as follows:

1. Major capital improvement. Just what will constitute such improvements it is hard to say for certain, as so much depends on the administrative authority. A mere painting will not be enough—you must put in a bathroom or do something that would fairly be chargeable to capital if you were keeping regular books.

2. Substantial increase in space, services, furniture, etc. or substantial increase in occupancy by adding an unusual number of people to the tenant's family in excess of normal occupancy for the type of house, or an increase in sub-tenants. These are self-explanatory but again all depends on the rent authorities.

3. Inequitable rents. Where the rents on the maximum rent date were out of line you can ask for relief. This does not mean you can get such relief if they are out of line, now compared with new housing, for example, but only if they were too low originally.

4. There are various other less important headings, but much of the activity in this line is now concentrated on a new ground for relief that was introduced in the 1949 Act. This allows landlords to get a raise in rents that will allow them a fair net operating income as determined by the Act. Such an income is defined as not less than 25% of the gross income in a building containing less than five dwelling units, and 20% where there are more than five. You are allowed all ordinary operating deductions in determining the net income, including depreciation, although this is limited by the amount shown in the Federal Income tax return or 21% of the gross (16% if more than five units). Remember that expenses for interest on mortgages are not deductible. From the point of view of the value of the real estate this has no relevancy.

Remember that these are individual adjustments having nothing to do with the general increase (now amounting to 20%), and relief may be sought even if you have obtained such an increase. Also remember that in any increases (except in uncontrolled property) a petition must be filed and notice must be given to the tenant, who has a chance to object. If a general increase within the 20% is sought, the tenant can probably make no useful objection, but in a special increase you must be sure to have your facts complete and make an adequate case on your petition. The tenant can also get a decrease on much the same ground.

SUMMARY PROCESS—EVICTIONS

Perhaps you will be most commonly called on to evict a tenant or resist an attempted eviction. In this field there are special regulations with which you must be familiar as well as with ordinary Massachusetts Summary Process jurisdiction. Again be sure to find out whether the property is controlled and, if it is, whether it is registered. Having determined this, quite different procedures must be undertaken, depending on whether the ground is non-payment of rent or other grounds where the tenant is at fault, or a variety of grounds where you wish to get the tenant out merely for the landlord's own purposes.

I. TENANT AT FAULT

These grounds include non-payment of rent—violation of substantial obligation of tenancy—nuisance and the like. Here no permission is needed from the rent office to proceed, but notice must be given to them and these notices are of varying periods depending on the particular ground. Furthermore, two notices must be given—one when the notice to quit is served and the other when suit is begun. In cases of non-payment of rent, the time for the first notice is at least ten days before the expiration of the fourteen days' notice to quit, and it must contain the facts showing the maximum rent, the rent in arrears, etc. The court will require a showing that such notice has been given at the time of the trial.

II. TENANT NOT AT FAULT

Here the procedure is quite different. No suit for eviction may be brought without advance permission of the authorities and this permission will be restricted to the following grounds —and varying periods of delay must be given before such permission is granted.

1. Landlord or contract purchaser with a right to immediate possession wishes accommodation for himself, his parent or child, but this is subject to certain limitations if landlord acquired the property after April 1, 1949.

These limitations are important, as they provide that such landlord or contract purchaser must have paid at least ten per cent of the purchase price himself, but fortunately this does not apply to veterans who have loans from the Veterans Administration. But be sure, if you represent a purchaser who intends to evict a tenant, that he has paid a sufficient sum above the mortgage to obtain this right. Notice, also, that a contract purchaser cannot bring a proceeding under this section unless he has a right to immediate possession.

Another interesting development to be noticed under this heading is the action of the Massachusetts Supreme Court in cases where the landlord alleged that he wanted the premises for himself or his relations, but used them for other purposes after the tenant was evicted. There have been numerous cases, almost all unsuccessful, claiming damages. The court has really got its ears back against granting relief, which is one of the situations that leads me to think that it will not construe very liberally the 1950 statute I have referred to* that imposes criminal penalties against a landlord where there is an implied contract for repairs, etc. Sundry very possibly sound technical objections were made in the various suits, and apparently the only way relief can be obtained is to claim and prove original deceit, and that no judgment has been rendered in the summary process action, or, if rendered, has been set aside. I am not claiming that the court is wrong, but its attitude is certainly consistent with the theme that I have mentioned before,* namely: that in a Landlord and Tenant case that is under Massachusetts law, or can be brought under it, the tenant has a difficult case. The case of *Gabriel v. Borowy*, 1951 A. S. 489, is the latest case and refers to and summarizes the others.

2. Landlord seeks in good faith to alter or remodel for additional accommodations, or to make improvements or to preserve and protect if necessary, and this cannot be done with the tenant in occupancy.

3. Withdrawal from rental market permanently.

4. Landlord a tax exempt organization and seeks recovery for use of its staff.

5. On general grounds in any case if the Director certifies that such eviction is not inconsistent with the act or would be likely to result in its evasion. The only case I know of on this particular point was when the landlord wanted to obtain the use of a rented house for a farm employee. I used the ground of withdrawal from the rental market, and it was suggested that I also proceed on the general ground and give all the facts. The petition was eventually granted, apparently on the general ground.

If you are successful in obtaining an order from the authorities on any of the above grounds, it will give a date upon which it will become effective, and no action in the local court can be brought until then. This date will require a wait of not less than the period called for in the regulations, usually three months. However, the waiting period may be shortened in cases of extreme hardship. I know this has been done in at least one case where a purchaser, with no accommodations, wished to remove a tenant in the new house who had somewhere to go. Another point that speeds up the process somewhat is that you can serve notices to quit during the waiting period, provided possession of the premises is not demanded until its expiration. This will save a month in the ordinary case.

I have given these matters in some detail because it is not always easy to find the regulations. At one time they were almost unobtainable in full as a practical matter—in at least one case the only copy was in the Area Rent Office and, I suppose, in the Federal Register and perhaps some services. Now, besides being available at the local Area Rent Office, they have been sent by that office to the various District Courts and can be consulted there. They are supposed to send any amendments also, and these may come out at any time. As in many other matters, the Clerk of Court is your best friend and will

give you the latest information on what is required by the judges in that particular court. For example, in the Municipal Court of the City of Boston there is a regular printed form of motion for judgment, which includes a copy of the notice of summary process sent the Area Rent Office and a certificate that such a notice was sent and that a notice to quit was sent at the proper time with a copy of this. If you have not done the things specified in the motion in the order named therein, you will not get your judgment. As the procedure in other courts is different, I earnestly advise you to familiarize yourself with it by talks with the Clerk before even giving the first notice in any proposed eviction action where there is controlled housing. In the cases where the housing is not controlled, it is proper to state in the writ that such is the case so that you will not run into a snag later. Reasons should be given that the premises are commercial property, were built after February 1947, or the like.

To close this subject I am sure that every one here realizes that where there is a maximum rent it is illegal to obtain a larger rent indirectly by the various means which have been tried, and you also know that the tenant may bring a suit for triple damages for the excess rent. You perhaps do not know that the U. S. also may bring such an action if the tenant fails or refuses to do so within thirty days or cannot bring it for some reason. The idea of this, of course, is that penalties may be enforcerd against rent gougers, even if the excess rent is charged with the consent of the tenant, which is not infrequently the case. I have heard more than one person who has charged extra rent say it is all right because the tenant was happy about it, but if it is discovered, he may well have the U. S. after him. I know one case where, in spite of warnings, a landlord made out a formal lease at an excess rent because the tenant, who was willing and able to pay, needed the premises badly and took a long lease. He was sure there would be no trouble, but it just happened that the tenant was an official of Lever Brothers, and arrived here only a few weeks before the whole office was unexpectedly transferred to New York, with him along with it. Needless to say there was considerable trouble about the rent. In addition the housing expediter may get an injunction against any acts or practices that may violate the law, and may subpoena any person involved for

investigation. However, to end on a more cheerful note, there are now no criminal penalties that may be invoked in connection with violation of the act.

Finally I suggest that anyone who has a rent control case should procure from his Area Rent Office or, if necessary, from the Office of Rent Stabilization in Washington (25) D. C., three pamphlets:

1. Rent Control Facts on Evictions.
2. Rent Control Facts for Tenants.
3. Rent Control Facts for Landlords.

These three pamphlets, together give an extremely useful and authentic summary of the law, with practical details as to procedure and solution of common situations. They will save a lot of delving into abstruse and difficult regulations.

* These observations refer to remarks made in the preceding part of this lecture to be printed later.

JOINDER OF CONTRACT AND TORT

As to Chapter 403 of the Acts of 1951 (quoted in the issue of October, 1951, p. 32) the need and purpose of which were questioned, FitzHenry Smith, who originally proposed the act of 1939, has called attention to the opinions in *Hacker* v. *Netschke*, 310 Mass. 754, at p. 757 and *Damiano* v. *Natl. Grange, etc. Co.*, 316 Mass. 626, at pp. 626 and 628. Under these opinions, unless we are mistaken, the new act was unnecessary.—F. W. G.

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March 18, 1952

Editor, Massachusetts Law Quarterly

Chapter 64 D of the General Laws (as added by Statutes 1951, Chapter 710 effective January 1, 1952) provides for excise tax on "Deed, instrument or writing, whereby any lands, tenements or other realty *sold* shall be granted, assigned, transferred or otherwise conveyed to, or vested in, the *purchaser or purchasers* or any other person or persons by his, her or their direction, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon *at the time of sale,* exceeds one hundred dollars and does not exceed five hundred dollars, one dollar; and for each edditional five hundred dollars or fractional part thereof, fifty-five cents." (Italics added for emphasis.) Instruments or writings given to secure a debt are expressly exempt from the tax.

Commissioner Henry F. Long has issued an informal departmental ruling that all transfers of land with a value in excess of $100 are considered to be subject to the tax whether or not the transfer was for valuable consideration. Presumably this ruling is based on a contention that there is consideration for every conveyance and on *G.L. c. 183, sec. 2* which states, "A deed of quitclaim and release shall be sufficient to convey all the estate which could lawfully be conveyed by a deed of bargain and sale." It is submitted that this interpretation is unrealistic and unsound.

The language of the Massachusetts statute is precisely the same as Section 3482 of the Federal Internal Revenue Code, except as to rates, which has been in effect (with short lapses) since 1914. It seems abundantly clear that the Massachusetts General Court employed the language of the Internal Revenue Code with the understanding that it would be interpreted in the same way. *Regulations 71, Sec. 113.80* states, "The tax is limited to conveyances of realty sold and does not apply to other conveyances" and *Sec. 113.82* explains that "The tax is based upon the net consideration where it is definite in amount, or may be definitely determined. The tax

is based upon net value where the amount of the consideration is indefinite, or is left open to be fixed by future contingencies." As examples of conveyances not subject to tax, *Sec. 113.84 (b)* lists, "Conveyances of realty without consideration and otherwise than in connection with a sale, including a deed conveying realty as a bona fide gift, although the deed may recite a consideration for the transfer, such as 'natural love and affection and $1', 'desire to promote public welfare and $1', or '$1 and other valuable consideration'; a gift of realty by a husband to his wife accomplished through the conveyance of the property for an ostensible consideration to a 'straw man' who immediately reconveys the property to the wife; and a deed to or by a trustee not pursuant to a sale."

It seems inescapable that the General Court's intention was to exact an excise parallel in all respects to the federal stamp tax except as to rates. Unless the Commissioner may be persuaded voluntarily to change his ruling, many unwarranted taxes will be extorted from innocent donors fearful of the costs of litigation.

WILLIAM MINOT

Note

We agree with Mr. Minot. The statute states expressly that it is limited to sales and is not a tax on the mere use of the technical words of conveyance where there is no sale. We see no reasonable ground for attributing to the legislature an intention to complicate and confuse the system and practice of land transfer by so strained an interpretation of the statute and we understand that leading conveyancers are not affixing stamps when there is no sale; they recite the fact that there is no sale. F. W. G.

RECORDING AND USE OF DEEDS IN EVIDENCE UNDER PROPOSED AMENDMENT OF THE STAMP ACT—VOTE OF EXECUTIVE COMMITTEE

A bill, House 2332, was reported by the Committee on Taxation and referred to Ways and Means. It was submitted to the Executive Committee on April 23 (16 members present) and the following resolution was unanimously adopted.

The bill contains the following sections:

SECTION 1. General Laws, chapter 64D, as inserted by chapter 710 of the Acts of 1951, is hereby amended by inserting after section 5 thereof the following section:—

Section 5A. The register of deeds or other recording officer shall not record any deed, instrument or writing to which this chapter is applicable without the stamps required by this chapter being affixed thereto, and all such deeds, instruments or writings shall have set forth therein that the true, full and complete consideration therefor, paid or to be paid, delivered or to be delivered, is not less than the amount stated thereon, and such deed, instrument or writing shall not be recorded unless such true, full and complete consideration is set forth therein; provided, that if any such deed, instrument or writing is presented for recording without showing the true, full and complete consideration therein, the register of deeds or other recording officer shall record the same upon the receipt of an affidavit, executed by a responsible person connected with the transaction and showing such connection, setting forth that the true, full and complete consideration is not less than the amount stated therein and upon affixation and cancellation of stamps in accordance with the value shown in the affidavit, which shall be filed in the office of the register of deeds or other recording officer.

Any person knowingly making a false statement or affidavit in respect to the consideration shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars, or by imprisonment for not more than one year, or both.

SECTION 2. Section 6 of chapter 64D, as inserted in the General Laws by chapter 710 of the acts of 1951, is hereby amended by adding after the word "chapter", just prior to the end of the second sentence thereof, the words:—provided, that before making such entry upon the premises of such a taxpayer he shall send to him a written notice of his intention so to do.

SECTION 3. Chapter 64D of the General Laws, as inserted by chapter 710 of the acts of 1951, is hereby amended by striking out section 7, as so appearing, and inserting in place thereof the following:—

Section 7. Any person liable to pay the tax imposed by this chapter, and any one who acts in the matter as agent of or attorney for such person, who delivers or presents for registration any deed, instrument or writing in respect of which such tax is payable without paying the full amount of such tax, shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars. No deed, instrument or writing required by this chapter to have affixed thereto the excise stamps herein provided shall be admissible in any civil proceedings as evidence of the facts therein stated unless the said stamps have been affixed thereto in the proper amount.

Resolution of Executive Committee

"Whereas House Bill 2332 reported by the Committee on Taxation relative to changes in the stamp tax on deeds provided by chapter 710 of the acts of 1951 provides in Section 3, lines 13-19 that

> "No deed, instrument or writing required by this chapter to have affixed thereto the excise stamps herein provided shall be admissible in any civil proceedings as evidence of the facts therein stated unless the said stamps have been affixed thereto in the proper amount."

"The Executive Committee of the Massachusetts Bar Association protests against the passage of the bill for the reasons, *first,* that the clause quoted would render all land titles uncertain; *second,* that the sections 1 and 3 of the bill would unwarrantably complicate the system of land transfer for landowners and their advisers; *third,* that a revenue act should *not* contain provisions to produce these results."

NOTE

The bill is opposed by the conveyancing bar committees and by registers of deeds. Think the Sections (quoted on page 20) *through* as a practising lawyer who has to advise about them and write your senator and representative what you think. F. W. G., Secretary.

FEDERAL INCOME TAX LIENS AND REGISTERED LAND

We are informed that a claim is made by the Federal Government that under Int. Rev. Code Sect. 3672 if a federal lien is recorded in the registry of deeds in the county where the land lies such recorded notice is sufficient to bind *registered* land. Such a claim seems to us unwarranted under G.L. Ch. 4, s 7, clause 17, Ch. 36, s. 24 and Ch. 185, §§ 57-61. See Boston v. De Grasse, 317 Mass. 523; U. S. v. Mamiaci, 36 Fed. Supp. 293, 116 Fed. 2nd 935; Youngblood v. U. S., 141 Fed. 2nd 912; U. S. v. Detroit, 141 Fed. 2nd 1021. Are we wrong in thinking that the lien *must* be filed with the assistant recorder of the Land Court? See Killam v. Marsh, 316 Mass. 646 at the top of p. 648. The Michigan law requires a description. We might well require the number of the registration certificate.—F. W. G.

THE UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT— ADOPTIONS AS OF FEBRUARY 1, 1952

The new Massachusetts Act—Chapter 657 of 1951 Approved September 5, was printed in full in the "Quarterly" for October, 1951, pp. 34-37.

For use in practice it is necessary to know what other states have adopted similar legislation. For the assistance of the bar, we have obtained from Willard B. Luther, the senior Massachusetts commissioner on Uniform State Laws, the following list. Ed.

1. STRAIGHT ADOPTIONS

   Alabama, Arkansas, California, Colorado, Connecticut, Hawaii, Idaho, Kansas, Maine, Missouri, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Wisconsin and Wyoming.
   Total:— 27

2. ADOPTION WITH SLIGHT MODIFICATIONS NOT AFFECTING SCOPE

   Maryland, Massachusetts, Minnesota and Washington.
   Total:— 4

3. STATES WITH SO-CALLED NEW YORK FORM OF STATUTE CONTAINING RECIPROCAL PROVISIONS WHICH WOULD TIE IN WITH THE UNIFORM ACT

   Delaware, Illinois, Indiana, Iowa, Kentucky, New Jersey, New York, Oklahoma, Virginia and the Virgin Islands.
   Total:— 10

4. NO ADOPTION

   Arizona, Florida, Louisiana, Michigan, Mississippi, Nevada, New Mexico, Vermont and West Virginia.
   Total:— 9

(no report on Georgia)

LATEST NEWS ON PLANNING BOARDS

In the note on p. 36 of the "Quarterly" for December 1951, attention was called to the committee of the Massachusetts Conveyancer's Association to assist the special commission. This committee having spent many hours going over the statutes as to sub-division control, section by section, and conferring with Mr. Philip Nichols, Judge Fenton and the Land Court officials, submitted to the special commission a clarifying redraft of the statute which is now under consideration by the commission. The following independent proposals, not covered by the committee, were also submitted to the commisison and supported by vote of the Executive Committee of the Massachusetts Bar Association as appears below.

MEMORANDUM ON SUBDIVISION CONTROL FOR CONSIDERATION OF THE SPECIAL COMMISSION—VOTE OF EXECUTIVE COMMITTEE

We wish to express appreciation of the public spirited service of the Committee of the Conveyancers' Association, and of Mr. Nichols, during their many hours of work to assist this Commission in clarifying the statutes. As explained by Mr. Muldoon, the Chairman of that Committee, they limited their report largely to conveyancing problems.

We wish to suggest the addition of the sections submitted and explained below from the broader point of view of the protection of land owners and local government throughout the Commonwealth. We regret that in doing so we may disagree with Mr. Nichols.

We are aware that conveyancers and the Bar generally were caught napping when the Planning Board statutes were first proposed. The reason is that "what is everybody's business is nobody's business," and this subject was not sufficiently studied by them as it should have been. They did not wake up until about two years ago. But the land owners of Massachusetts should not be penalized for the mistake of the Bar in overlooking the importance of this legislation.

We believe so much power is being distributed in this country that the purpose of the Massachusetts constitution is being defeated and we are headed for centralized government of men and not laws unless we are more guarded.

We believe the land owner needs more protection against arbitrary unconstitutional rules and administration than is provided either in the present law or in the Committee's revision.

We suggest the addition of the following:—

1. A final section as follows:
   If anything in this Act or in its administration shall be held to be unconstitutional, it shall not affect the remainder of the Act or of its administration.

   Note: This is in substance a common provision in our statutes and recognizes the possibilities of illegality in a long and complicated statute under the vague and general "police power." The recent decisions in *Olson vs. Arruda 1952 Advance Sheets 177, and Hurley vs. Guzzi, 1952 A.S. 107,* show that there are still land owners' rights outside of the Planning Act.

2. Nothing in this Act shall be construed as an amendment or repeal of General Laws, Chapter 40, Sections 25 to 32 inclusive, together with amendment or amendments thereof.

   Note: This will protect the zoning law and is needed, as we are informed that some city or town counsel have ruled that the Planning Act supersedes the zoning ordinances.

3. Upon a two-thirds vote of a regular or special town meeting in a town, or a two-thirds vote of a city council in a city, the city or town may rescind its acceptance of the subdivision control law.

   Note: Both zoning under the 60th amendment, and planning under the present "police power" statute, are recognized as matters of local self-government by the requirement that the planning act shall be accepted by cities and towns. If there is to be local government, a city or town should be able to change its mind as an individual can when he finds he has made a mistake.

4. The rules of Planning Boards should be approved by the city or town authorities before they take effect, as in the

case with zoning ordinances which are made by those authorities. See General Laws, Section 27 of Chapter 40. Planning Boards should not be made a super-local government as they are under the present law and under the proposed revision.

FRANK W. GRINNELL, JOHN A. MCCARTY

Vote of Executive Committee

This memorandum was sent to each member of the Executive Committee in advance of the meeting of that committee on March 19, 1952. After discussion the committee (14 members present) voted in support of proposals in the memorandum with an added suggestion of Mr. Bodfish of Springfield, who suggested "that the 3rd proposal that the town or city authorities could rescind acceptance of the act by a two-thirds vote be amended by adding the words 'or any part thereof' at the end; That some cities or towns had accepted the earlier planning acts before the later acts about sub-division control and had then been subjected to those control acts without acceptance and this was not consistent with local government."

This vote was communicated to Hon. Paul Achin, Chairman of the Commission. F.W.G.

FURTHER DISCUSSION OF PLANNING AND ZONING

By John A. McCarty

The present statutes with regard to the adoption or change of zoning ordinances or by-laws should be amended to take care of the following difficulty:

G.L. Chap. 40, Sec. 27 provides in part: "No ordinance or by-law originally establishing the boundaries of the districts or the regulations and restrictions to be enforced therein, and no ordinance or by-law changing the same as aforesaid, shall be adopted until after the planning board, . . . has held a public hearing thereon after due notice given and has submitted a final report with recommendations to the city council or

town meeting, or until twenty days shall have elapsed after such hearing without the submission of such report;".

Section 28 of the same Chapter provides: "No such ordinance or amendment thereof shall affect any permit issued in a city before notice of hearing before the planning board . . . has first been given . . . provided, that construction work under such permit is commenced within six months after its issue."

These two sections appear to me to mean that a planning board may give notice of a proposed change of zone and hold a public hearing as provided in Section 28. It may then take no further action and the city council may not act in accordance with the provision of Sec. 27, which gives them power to act after twenty days have elapsed without a report, and the effect would be that any permit issued after the notice of the hearing before the planning board would be affected by any action ultimately taken in changing the zone regardless of how long after such action was taken.

To illustrate by example exactly what I mean: On Feb. 20, 1950 a hearing before the planning board of a city in Metropolitan Boston was held after due notice on a proposal to change the zone of all undeveloped land lying within a large area of that city. After the hearing, the planning board voted to retain the matter for further study. It has never made recommendation to the city council for change in zone, but under the provisions of Section 28 any permit issued is affected by any action the city council may take in the future if the planning board chooses to make a recommendation to it and it chooses to act upon it.

It should be pointed out that the city council is not bound to adopt the change the planning board recommends, but may modify it or change it in any way it sees fit, so that no one can know what ordinance will ultimately be adopted and yet any permit issued after the notice of that hearing in 1950 is affected by such ordinance whenever it may be adopted.

NOTE—As to boards of health and planning see Chapter 134 of 1952 on p. 41, herein.

WHEN CAN, OR SHOULD A MAJORITY OF A MAJORITY OF A PUBLIC BOARD ACT? SUGGESTIONS REQUESTED

JAMES J. KELLEHER

One of the Commissioners to Revise the General Laws

Mr. Kelleher discusses a problem and a recommendation he has made to his fellow Commissioners for the inclusion in the General Laws of an interpretative provision relative to the problem. Comments of readers are solicited and can be addressed to the Editor or to Mr. Kelleher at the office of the Commission, 11 Pemberton Square, Boston.

The Editor has been requested to remind the members of the Association that the Commissioners would like to hear from any member of the bar who has any suggestions for corrective changes in the General Laws or relative to provisions which it is thought should be included in the General Laws. The importance of the question and the want of any previous complete discussion and comparison of the many decisions bearing upon it justify, it is believed, the fullness of the following notes. Editor.

AUTHORITY OF LESS THAN ALL MEMBERS TO ACT

I

In many sections of the General Laws it is specifically provided that a majority of the particular board or commission shall constitute a quorum[1]. In others when action in writing by a three member board is required, such writing shall be sufficient if signed by two members (See G.L. c. 6, §§ 48, 60); and others contain the related provisions that a vacancy in a three member or one or two vacancies or any vacancy in a five member board shall not impair the right of the remaining members to exercise all the powers of the board. (See G.L. c. 6, §§ 56, 61, 64; G.L. c. 20, § 7).

The common law rule is stated in Merrill v. Lowell, 236 Mass. 463, 467:—

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[1] (See G.L. c. 6, §§ 56, 59A, 64, 66, 69; G.L. c. 13, §§ 12B, 44B, 46; G.L. c. 20, § 7; G.L. c. 21, § 5; G.L. c. 22, §§ 11, 14; G.L. c. 23, § 90; G.L. c. 41, § 69A; G.L. c. 58A, § 1; G.L. c. 128B, § 3; G.L. c. 138, § 83).

"In the absence of statutory restriction the general rule is that a majority of a council or board is a quorum and a majority of the quorum can act."

It is provided by G.L. c. 4, § 6, Fifth, that:—

"Words purporting to give a joint authority to, or to direct any act by, three or more public officers or other persons shall be construed as giving such authority to, or directing such act by, a majority of such officers or persons."

Superficially it would appear that the statute merely states the same rule as the decision quoted in a different way. A closer reading of the statutory provision and a reference to the decided cases discloses a possible conflict in the application of the common law rule and that prescribed by statute to administrative and deliberative boards consisting of *more than* three members. The possibility of such conflict has been recognized by the Court, but no case has arisen in which the point has been raised, so as to require the determination of the Court.

Although the language of clause Fifth is not necessarily inconsistent with the common law rule, it is susceptible of the construction that the concurrence of a majority of all the members of a board of three or more public officers is required.

In the cases decided by the Supreme Judicial Court in which the common law rule is stated and applied to uphold action taken by less than a majority of all the members of a board of public officers of *more than* three members but by a majority of a quorum thereof, no reference whatever was made to G.L. c. 4, § 6, Fifth.

In *Codman v. Crocker*, 203 Mass. 146, 154, it is stated,

"They also say that the determination of the Transit Commission is invalid because only a majority of the board considered and decided the question. The Transit Commission is an administrative board of public officers. In this business its members were not acting judicially but as representatives of the public in the administration of the law. Such a board may act by a majority of its members, if all have had notice and an opportunity to act, and the determination of a majority of a quorum under such circumstances is binding."

The Boston Transit Commission was originally established under St. 1893, c. 478, and its membership was increased by St. 1894, c. 548, to five members. Neither statute contains a provision relative to a quorum.

In *Real Properties, Inc. v. Board of Appeal of Boston*, 311 Mass. 430, 434, it is stated that the bill of complaint in the Codman case alleged that only three of the five members of the Transit Commission were present at the time the action in question was taken and only two of the three voted in favor of such action. In the Real Properties, Inc. case, at pages 434, 435, the Court says, "*To what extent the principle that a majority of a quorum consisting of only a majority of a board may act is applicable to cases within the scope of G.L. (Ter. Ed.) c. 4, § 6, Fifth, need not be considered, since in the present case the subject is covered by specific statutory provisions.*" (Emphasis supplied.)

In *Clark v. City Council of Waltham*, 1951 Adv. Shts. 1063, the Court applied the common law rule in a dictum. The board in that case was the eleven member council of the city of Waltham, which is governed by a Plan B charter. At a meeting with ten of the members present, on the question of the confirmation of an appointment made by the mayor, four councillors voted in favor, one against and five did not vote. The Court expressed the opinion that the appointment had been confirmed and quoted the rule from *Merrill v. Lowell*, supra. However, G.L. c. 43, § 18, which was not referred to in the opinion provides that a majority of the council in a city adopting one of the plan charters shall constitute a quorum and although it is also provided in that section that the affirmative vote of a majority of all the members shall be necessary to adopt any motion, resolution or ordinance. If the latter requirement was not intended to be applicable to a vote on the question of the confirmation of an appointment (See Dooling v. Fitchburg, 242 Mass. 599) the provision as to a majority constituting a quorum had full operation and resolved any conflict in the application to the vote in question of the common law rule and the provisions of G. L. (Ter. Ed.) c. 4, § 6, Fifth (Ray v. Armstrong, 140 Ky. 800, intra).

A case somewhat similar to the Clark case is *Dodsworth v. Mayor of Medford*, 308 Mass. 62. There an appointment

subject to the confirmation of the board of aldermen was approved by a majority of a quorum but less than a majority of all the members. The court stated (p. 65) that the appointment had been confirmed, but its decision must be read in the light of the fact, not mentioned in the decision, that under the charter (St. 1903, 345, §13), a majority of the whole number of the members of the board constituted a quorum.

In *Commonwealth v. Allen,* 128 Mass. 308, the Court in discussing the question of whether an appointment of the mayor of New Bedford had been confirmed as required by St. 1876, c. 80 (G.L. c. 39, §1) stated (p. 311) "The manifest intent and necessary effect of this enactment are that a person nominated by the mayor to any office must receive the votes of a majority of the aldermen *voting upon the question,* in order to be confirmed, and that, if he does not receive such majority of votes, his nomination is rejected." (Emphasis supplied) The broad holding expressed is, however, limited by the facts of the case, which were, that all of the members of the board of aldermen which consisted of six members had voted on the question of confirmation, three voting in the affirmative and three in the negative. The city charter also provided that a majority of the board of aldermen should constitute a quorum.

In V Op. A.G. 648, G.L. c. 4, § 6, Fifth was held to require the approval of expenditures for the Soldiers' Home in Massachusetts by a majority of the trustees. Citing the corresponding provision of earlier law, the opinion states, "Where joint authority is conferred upon public officers, in order to have a valid act, *a majority must approve.*" (italics supplied.)

In an opinion of the Attorney General dated July 22, 1946, to the Massachusetts Aeronautics Commission (1947 A.G. 13) in answer to a question as to whether G. L. c. 4, § 6, Fifth, or any other provision of law required . . . "that official acts of the Commission shall be based upon a majority vote of the full commission or may its statutory authority be exercised by the vote of a majority of a quorum which would be less than a majority of the entire Commission of five members", the Attorney General stated:—

> "I answer your question to the effect that official acts of the commission are required to be based upon a majority vote of the full commission. Although a majority of

the commission constitutes a quorum which may transact necessary business, a vote by a majority of such quorum, when it is less than a majority of the entire commission, does not constitute action by the commission as such." The opinion then quotes G.L. c. § 6, Fifth.

The provisions of the General Laws establishing the Aeronautics Commission which were construed by the Attorney General are contained in G.L. (Ter. Ed.) c. 6, §§ 57, 58, and 59. The sections referred to do not contain a provision prescribing how many members shall constitute a quorum.

It is apparent that the opinion of the Attorney General is exactly contrary to the decision of the Court in the case of Codman v. Crocker, supra.

With few exceptions, the cases in which the provisions of G.L. c. 4, § 6, Fifth, have been expressly applied by the Court involved boards of *only* three public officers. In such cases the requirement of a majority of a board coincides with the requirement of a majority of a quorum, so that there was no conflict.*

Cases in addition to that of Real Properties, Inc. v. Board, supra, which state the common law rule in the course of applying a statute prescribing a different rule for a particular board or for certain proceedings before the board, are the following: *Perkins v. School Committee of Quincy*, 315 Mass. 47; *Sesno-*

* Among such cases are the following: *Williams v. School District in Lunenberg*, 21 Pick 75 (three assessors, one though notified refused to act); *Reynolds v. New Salem*, 6 Metcalf, 340, 342 (selectmen, one only signed warrant); *George v. School District in Mendon*, 6 Metcalf 497, 512 (three assessors, one did not qualify and refused to participate); *Coffin v. Nantucket*, 5 Cush. 269 (firewards, one only of three acting); *Howard v. Proctor*, 7 Gray 128 (selectmen, if one disqualified the other two could act); *Plymouth v. County Commissioners*, 16 Gray 341 (two voting in the affirmative, one dissenting); *Mayor of Worcester v. Railroad Commissioners*, 113 Mass. 161, 174 (three commissioners, one absent, action supported by other two valid); *Reed v. Lancaster*, 152 Mass. 500 (three overseers of poor, two could make binding contract, if other had opportunity to participate). *Damon v. Selectmen*, 195 Mass. 72 (three selectmen, two could appoint, if other had reasonable notice of meeting); *Cook v. Scituate*, 201 Mass. 107 (three assessors, two surviving could make assessments after death of third); *Coyne v. Alcoholic Beverages Control Commission*, 312 Mass. 224, 228 (one member disqualified the other two could act); See also *Demos Bros. Gen. Contractors, Inc. v. Springfield*, 322 Mass. 171, 175. In *Kaeble v. Mayor of Chicopee*, 311 Mass. 260, a case in which a board of more than three public officers was involved, more than a majority of the whole board concurred, so that there was no conflict. See also *Weymouth etc. Fire District v. County Commissioners*, 108 Mass. 142.

vich v. Board of Appeal of Boston, 313 *Mass.* 393, 397; *Ellison v. Haverhill,* 309 Mass. 350. *Merrill v. Lowell* (supra).

It has been held that where it is provided that a majority of a public body shall constitute a quorum, that under a statutory provision similar to and undoubtedly derived from the provision now contained in G.L. c. 4, § 6, Fifth, a majority of the quorum can exercise the authority. *Ray v. Armstrong,* 140 Ky. 800, 820. In the case of *Hodges Executor v. Thacher,* 23 Vt. 455, the Court in construing the Vermont counterpart of G.L. c. 4, § 6, Fifth, states that it originated in Massachusetts. In that case the Court appears to favor the view that the language used requires a majority of all the public officers. In the case of *Palmer v. Conway,* 22 N. H. 144, the court intimates that a provision such as G.L. c. 4, §6, Fifth, requires a full board and a meeting attended by all the members before action by a majority of the officers should be sufficient.

The historical background of G.L. c. 4, §6, Fifth, would seem to justify the conclusion that it was not intended to state the now definitely settled common law rule that a majority constitutes a quorum and a majority of a quorum can act. The substance of the provisions now contained in G.L. c. 4, §6, Fifth, was suggested by the Commissioners on the Revised Statutes (1836). In a note to c. 2, §7, of their report the Commissioners stated that they proposed the rule of construction stated "In order to avoid the perpetual recurrence of cumbrous phraseology". One of the examples given is the phrase, —"they or the major part of them".

The cases before 1836 indicate that the law on the subject was still in the process of development in 1836.*

In the case of *Jones v. Andover,* 9 Pick. 146 (1829) the action of four out of five selectmen in laying out a road was objected to on the ground that they were not authorized to act by a majority. The whole tenor of the elaborate discussion of the problem in the opinion by Parker, C.J. is directed to the point that the presence of all the selectmen and a decision concurred in by all was not necessary.

There is no definite indication, however, whether the Court in holding that selectmen "may lawfully perform their duty by a major part of the whole number," "act by majorities" etc. meant that the concurrence of a majority of the whole

* In 1824, the Court in the case of *Damon v. Granby*, 2 Pick. 345, considered the validity of action taken by a committee appointed by a town to superintend the construction of a meetinghouse. The original membership had been increased by three to a total of fifteen, and two of the newly appointed members being prevented from taking part in the deliberations they, with six of the old members, withdrew leaving a minority of the whole number. The Court held that the action taken by the minority left was without effect and stated p. 355,

"It is true that *all* the members being assembled, or *perhaps* if only duly notified, a majority of those present have authority to proceed, *if a majority of the whole number are present.* But we cannot think that if a major part withdraw in the belief that they, or any of them, are to be prevented from acting, the minority can assume the powers of the whole body. A major part of the whole is necessary to constitute a quorum, and a majority of such quorum may act. In this respect we think there is a difference *between the constituent body and the agent.* In the former, those who assemble, all being duly warned, have the power of the whole, unless some number is established by law, charter, or by-law, as a quorum. In the latter, the power is delegated to the whole number constituting the agency; and though convenience requires and usage has established the right of acting by majorities, neither will sanction the exercise of the power by minorities. (emphasis supplied).

The question before the Court in the case did not require a decision as to the authority of the body to act by a majority of a quorum, there being in fact only a minority of the members present and the language used manifests some uncertainty, that used in the first sentence quoted being self-contradictory and other decisions rendered before and subsequent thereto indicate that the rule was not fully established until some time later. See *Kupfer v. South Parish in Augusta*, 12, Mass. 186, 189; *Moffitt v. Jaquins*, 2 Pick. 330 and *Sprague v. Bailey*, 19 Pick. 436, (the latter case concerned action taken by a board prior to 1836).

In the case of *First Parish in Sutton v. Cole*, 3 Pick. 232, 244, 245, (1825) the court says . . . "it seems to be a settled principle of law, that where a bare authority is given to two persons, one alone cannot exercise it, nor if one dies does the authority survive to the other. . . . The only cases in which the rule of law may *have been thought* to be relaxed, is where committees of public bodies have been allowed to act by a majority, though the authority may seem to be joint; but this is from reasons of policy and public good . . ." (italics supplied). In other decisions rendered during the same period the Court held that in certain instances the full number of public officers must hear the parties although a majority could decide. One of the cases is *Commonwealth v. Ipswich*, 2 Pick. 70, in the same volume in which the case of *Damon v. Granby*, supra, is reported. It there appeared that a committee of five was appointed under St. 1786, c. 67, §4, by the Court of Sessions to lay out a road and make return to the Court. The statute after providing that the committee should give notice etc. provided that "they or the major part of them shall make return thereof." The return of the committee was signed by four only of the members and recited that only four met, the fifth not being present. The Court quashed the proceeding without decision. In the case of *Short v. Pratt*, 6 Mass. 496, (1810), the Court stated (pp. 497-498). "The statute under which these proceedings were had, requires the submission to be made to all the referees named; although if the greater part agree, the report shall be a foundation for a judgment, and upon a recommitment of the report, all the referees must hear the parties; and if they do not all agree, the greater part may proceed."

would be required or that a majority of a quorum consisting of a majority would be enough. It would appear that the Court in the Jones case was satisfied to go only so far as to say that unanimity was not required and to leave for the future the further development of the principles to be applied in construing the powers of boards of public officers to act by less than all of the members. It would seem that the commissioners in 1836 would not have intended to go any farther, particularly in view of the broad application of the provision they recommended and the cases cited holding that in some instances all must be present although a majority can decide. The Court in the Jones case explains the earlier statutes reciting that the selectmen, or a major part of them, may act, as arising "from abundant caution, without attending, in the hurry of legislation, to the original organization of that body" and concludes as follows (p. 152). "We think therefore, that by ancient usage, as well as by fair construction of ancient statutes, by the necessary and practical construction of the constitution, and of the laws made under it, it is manifest, that in all cases in which power is given or duty imposed upon selectmen, that body is taken to be a *qua* corporation, and *must act by a majority.*" (italics supplied.)

In the case of *Day v. Green*, 4 Cush. 433 (1849), Chief Justice Shaw, in the course of a decision holding that the mayor and alderman, acting as a board, could not delegate one of their licensing powers to the mayor, says at page 439,—

> "Where by law, two or more justices are authorized to act, they must act together, for this reason, that they should assist each other, and the result of their conference be the ground of their determination. It is deemed not a ministerial act, but a judicial act, in which they are to exercise discretion.
>
> . . . . . .
>
> When such an authority [licensing] is vested in a committee, or other body, all must have notice. A majority, unless some other number is made a *quorum* by the act or law under which they are organized, must meet and act together, when the act of a majority is the act of the body, unless otherwise determined by their constitution. *Commonwealth v. Ipswich*, 2 Pick. 70; *Damon v. Granby*, 2 Pick. 345; *Williams v. Lunenberg*, 21 Pick. 75."

Recommendation

To avoid any necessity for including in sections of the General Laws relating to the establishment of boards and commissions a provision stating the ordinary rule as to the number of members who shall constitute a quorum and because of the possible conflict between the common law rule and the provisions of G.L. (Ter. Ed.) c. 4, §6, Fifth, as applied to action taken by administrative or deliberative boards, I have suggested for the consideration of my fellow commissioners the following clause to be recommended for inclusion in G.L. c. 4, §6:

> Authority vested in three or more public officers organized and acting together as a deliberative or administrative board may be exercised by a quorum consisting of a majority of such officers present at a duly convened meeting.

As shown by the cases of *Codman v. Crocker,* 203 Mass. 146; *Merrill v. Lowell,* 236 Mass. 463; and *Clark v. City Council of Waltham,* 1951 Adv. Sheets 1063, it is well established that a board of public officers can act by a majority of a quorum. That administrative boards may so act, even in instances where they are acting quasi judicially, would appear to be the law, although there is no decision on the point. In the case of *Real Properties, Inc. v. Board of Appeal of Boston,* referred to above, the board whose decision was being reviewed had acted quasi judicially. The case was on certiorari and the Court quoted the rule from the Codman and Crocker cases, with approval and without any indication that it did not apply in cases where a board had acted quasi judicially. Compare G.L. c. 211, §2, and see VII Massachusetts Law Quarterly No. 4, p. 39.

In the case of *Perkins v. School Committee of Quincy,* 315 Mass. 47, the Court considered the legality of a vote dismissing a teacher under G.L. c. 71, §42. The statute gave the teacher a right to a hearing "before the school committee" and required a "two thirds vote of the whole committee". It was held (p. 51) the requirements quoted "necessarily imply that a quorum of the committee for the purpose of such a hearing must consist of not less than two thirds of the whole committee". Although five of the seven members of the committee were present at the hearing given to the petitioner, only

four of the five present voted for her dismissal, but the remaining two members although not present at the hearing voted for dismissal. It was held that the votes of the two members who did not participate in the hearing could not be counted, and the dismissal was illegal. The Court stated (p. 52) that "The statute necessarily implies not only that a hearing . . . shall be a condition precedent to dismissal, but also that the participation in such hearing of a member of the school committee who votes for dismissal of the teacher shall be a condition precedent to such a vote." The Perkins case indicates that where a board is acting quasi judicially not only must at least a quorum be present but a vote by a majority of those present will be sustained only if those making up the majority were present at the hearing. See also *Sesnovich v. Board of Appeal of Boston,* 313 Mass. 393, 396, 397; *Farrell v. Mayor of Revere,* 306 Mass. 321.

The point may be made that the provision should be, that if a quorum is present, at least where a board is not acting quasi judicially, that a vote of a majority of those present *and voting* should constitute action by the board. Such a provision is contained in G.L. c. 4, §6, Seventh, which is applicable where "action by more than a majority of a city council is required" and there is no requirement that a quorum be present. The answer is, that the provision suggested follows closely the language used by the Court in the cases cited. The question of whether, if a quorum of a board is present, but less than a quorum vote, the rule laid down by the Court would be satisfied by a vote of a majority of those voting if fewer in number than a majority of a quorum has not been decided by our Supreme Judicial Court. In the case of *Kay Jewelry Company v. Board of Registration in Optometry,* 305 Mass. 581, 587, 588, a possible construction of the words "two thirds of the said senate or house of representatives" contained in c. 1, §1, Article 2 of the Constitution of the Commonwealth, as meaning two thirds of the members present and voting, there being a quorum present, was adverted to, but the case did not require the Court to pass upon the question. But see *Ellison v. Haverhill,* 309 Mass. 350, 351, and *Clark v. City Council of Waltham,* 1951 Adv. Shts. 1063.

The amendment recommended will not interfere with the application of c. 4, §6, Fifth, to other persons or officers or to

boards, which are not deliberative or administrative bodies, to which the clause might be applicable and by vesting authority to act in a quorum consisting of a majority of a deliberative or administrative board, will permit said clause Fifth to operate in such cases to authorize action by a majority of a quorum, (*Ray v. Armstrong*, 140 Ky. 800, supra) and thus resolve any conflict of said clause Fifth, as to such boards, with the common law rule.

The provision presently contained in the first paragraph of §6 will prevent the application of the proposed rule of construction where its observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute.

Perhaps, however, despite the fact that the Supreme Judicial Court has not yet decided that, if at least a quorum of the members of a board of public officers are present, the vote of a majority of those present *and voting* is sufficient for the exercise of the powers of the board, the clause suggested should go farther and include a provision to that effect. Thus, the following could be added to the clause suggested above:

> and if at least a quorum is present the vote of a majority of those present and voting shall be a valid exercise of the authority of the board.

The writer would like to have the views of readers on the subject discussed and particularly those of persons in official capacities concerned with the action of deliberative and administrative bodies.

Note

A Tentative Suggestion by the Editor

Without professing any special study of the subject but with the hope of stimulating others to express their views for the assistance of the commissioners, we suggest that while a majority if duly notified is a quorum for consideration and action if they agree, yet, if they disagree, a majority of the whole number should be required in order to decide and act. That is the obvious rule for a board of three. Why should it differ for a board of five or seven or more? The purpose of the larger number would seem to be to have more than two or three "assist each other" in deciding, as Chief Justice Shaw said in the case cited. Were not the commissioners of 1836 wise in their caution? Whatever the rule in earlier days when life was simpler and delegated power less

common, the enormous expansion of administrative boards with delegated power so that land owners, business men and citizens generally can hardly turn a corner in life without running up against a "board", suggests the question whether they are not entitled to the protection of the judgment of a majority of the whole board. Have the standards of careful fairness of each individual member of "boards" kept pace with the modern increase in numbers or not? Is, or is not, the tendency in the direction of *petty* "tyranny" in the form of ill considered arbitrary action under statutes often vague, or themselves arbitrary in their delegation of power to members selected politically, or otherwise, without special knowledge, training, experience, fair-mindedness, consciousness of responsibilities, or otherwise? Should not the "people" subjected to such delegated power be entitled to the judgment of a majority of the whole before *action*? If not, why not? How about some of the "planning" or "zoning" boards? Are not these fair questions? We ask them for you to answer.

The following comment has been made on these questions:

> "I think that the common law rule that a majority of a quorum of a board of public officers, or for that matter of a board of directors, can act is a rule of practical necessity if the public and other business is to be done. Your comments really relate to those instances which should be exceptions to the general rule because of the importance of the subject matter dealt with and in such instances, the number of concurring votes to be required should be specifically stated in the statute creating the board. Further, I think that the related rule that if at least a quorum are present that a vote concurred in by a majority of those *present and voting*, which is favored by the dictum in the case of Clark v. City Council of Waltham, 1951 Adv. Sheets 1063, is also a rule of necessity for general application. Otherwise a few members by refusing to do anything can prevent any action being taken. The principle followed by the Courts adopting that rule is that silence is assent."

Are there not practical differences between many public "boards" and legislative bodies like city councils or boards of directors? How practicable or impracticable would it be to provide that if a board of *more* than three is created a majority of all must act unless it is otherwise specifically provided? Might it not be wise thus to encourage three as the normal number for a board?

The comparison of such boards with a Supreme Court (discussed in VII M.L.Q. No. 4, p. 39) would seem fallacious. The practice of our court in case of disagreement is to *act* only by a majority of the whole. The minority-majority opinion of the Supreme Court of the United States in U.S. v. Texas, 339 U.S. seems a very unfortunate practice not calculated to inspire confidence. F. W. G.

CONGESTION IN THE SUPERIOR COURT — PROPOSAL FOR MORE JUDGES — ACTION OF THE EXECUTIVE COMMITTEE AND MEMORANDUM OF THE SECRETARY

A bill (House 2346) to add four more judges to the Superior Court was reported by the Judiciary Committee, Senators Clampit, Innes and Mahar, and Representatives Howard of Westminster, Hays of Waltham and Tyler of Watertown, dissenting.

The bill was referred to the House Ways and Means Committee. In response to a request by the chairman for an expression of opinion, the bill was submitted to the executive committee at a meeting on April 23. After discussion (16 members present) the committee voted 11 to 4 in opposition to the bill, the president not voting.

The secretary presented the vote to the Committee on Ways and Means with the following memorandum which, because of somewhat inaccurate press reports was sent to the press and was printed in the Springfield Union of May 2.

Secretary's Memorandum

"The reports of the hearing yesterday before the Ways and Means Committee on the bill to add four judges to the Superior Court and what I said in opposition were too brief to show why the bill would be 'an expensive method of getting nowhere' in curing congestion which is the purpose of the bill. As the public would pay the cost they should understand what they would be paying for.

"I appeared on behalf of a majority of 11 to 4 of the members of the executive committee of the Massachusetts Bar Association. I was not stating merely my own opinion or that of the committee.

"The matter of congestion was carefully studied by the Judicial Council in its 8th and 9th reports. The picture of congestion then did not differ greatly from what it is today. The Council said,

> " 'The most common suggestion for dealing with congestion is to add more judges to the court. This proposal is easy to make, but, as has been shown repeatedly, it has never cured congestion. The Superior Court was created in 1859 with ten judges. It has been gradually enlarged to thirty-two judges and yet the congestion has steadily increased. As we pointed out in our last report, if we doubled the number of judges it would take years to try the cases now on the dockets and in the meantime the new cases would be coming in at the rate of 30,000 or more a year.

> In our opinion, the proposal to increase the number of judges would be an expensive method of getting us nowhere.'

"The contributing factors in congestion and delay were discussed in the 8th report and the Council said,

> " 'Considering it both from a business and from a social point of view the question arises whether the public in attempting to provide theoretical opportunities for obtaining justice is not in fact providing excessively dilatory machinery which defeats its own purpose at an enormous expense to the public.'

"Congestion has been discussed in print by Mr. Justice Cox and Mr. Justice Lummus. Various plans have been suggested but not tried here. The main cause of congestion is in the thousands of claims for jury trial of civil cases, most of which are never tried. New York provided for a $25 jury fee. As stated by Judge Proskaner of New York, 'This statute was followed by a reduction of 75 per cent in the number of issues filed for jury trial.' From 1805 to 1836 in Massachusetts, when jurors received $1.25 a day, the plaintiff paid a jury fee of $7. Today jurors receive $8 per day and the compensation alone, without travel and so forth, of a full jury of twelve is $96 a day in addition to the cost of the judge, court officers, etc.—the most expensive form of trial—and, any litigant can claim it for nothing at the expense of the public. Cases involving $75 or so are being tried at that public cost. 30,000 civil cases were entered last year and only 3,266 were tried. Four more judges would try only a few hundred cases and would cost $64,000 in salaries besides other costs. The situation is like a tank with a big inflow pipe and a small overflow pipe. There will always be congestion under such circumstances.

"The total cost of jury trials, including overhead, has been figured at from $400 to $500 a day. All this information was submitted to the bar association committee and that is what I submitted to the Committee on Ways and Means for their information and to show that more judges would not change the piping system. I did not suggest an increased entry fee as a remedy. The current recommendation of the Judicial Council is a jury claim fee of $15. for the double purpose of reducing congestion and the burden of cost to the counties. A trial without jury costs the public less."

FRANK W. GRINNELL, *Secretary.*

NOTE

The notion "that congestion" is worse than it was before the war is mistaken. It was just as bad twenty years ago.

The bar does not seem to remember that twenty years or so ago there was an active movement to lift all the motor vehicle torts out of the courts by creating a compensation board like the Industrial Accident Board. A three hundred page study of the subject by the Columbia University Research Committee was published in 1932 and widely discussed throughout the country as well as in

Massachusetts. See 8th report of the Judicial Council, p. 23 et seq. and references therein (18 M.L.Q. No. 1, Nov. 1932). That movement is not dead. Within a few days the press has reported a more limited experiment just adopted in New Jersey for injuries caused by unknown "hit and run" drivers. The extent to which commercial business is leaving the courts for arbitration in New York and elsewhere also illustrates the tendency unless, as the Judicial Council said years ago, the bar cooperates in practical measures directed at the source of congestion instead of expensive theoretical measures for more judges. A moderate jury fee seems to be the most reasonable and probably effective experiment to begin with if motor vehicle cases are to be kept in the courts.—F. W. G.

[CHAP. 134]

AN ACT REQUIRING THE APPROVAL OF THE BOARD OF HEALTH BEFORE A PLANNING BOARD MAY APPROVE A PLAT.

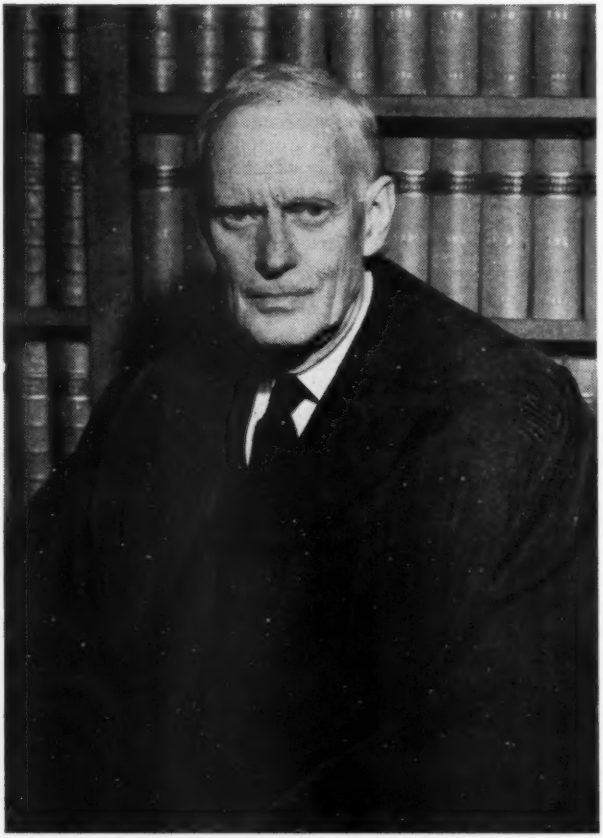
SECTION 1. The third paragraph of section 81M of chapter 41 of the General Laws, as appearing in section 4 of chapter 340 of the acts of 1947, is hereby amended by inserting after the third sentence the following sentence:—No such subdivision shall be approved until the local board of health has advised the planning board, in writing, that it has approved the proposed method of providing for sanitary water supply, sewage disposal and drainage.

SECTION 2. The provisions of this act shall also apply to any subdivision approved by a planning board prior to its effective date if no building has been constructed in such subdivision.

Approved March 7, 1952.

NOTE

Section 2 has already caused serious problems for landowners and conveyancers. As a special commission was in existence to study the whole subject of zoning and planning, it seems unfortunate that such a statute should have been passed without being referred to them. We hear complaints of the cost of examining titles. Hasty ill-considered statutes affecting land increase the difficulties and the cost. We think section 2 should be repealed as soon as possible. The Abstract Club at a recent meeting at which twenty-five experienced conveyancers were present, so voted unanimously. Think it out as a practising lawyer and write your senator and representative. F. W. G.



HON. STANLEY E. QUA

Chief Justice, Supreme Judicial Court of Massachusetts

Photograph by Charles F. McCormick—Courtesy of the Boston Globe.

THE FINDING OF THE COURT IN THE INQUIRY CONDUCTED AS A RESULT OF THE INFORMATION FILED IN THE "CENDELLA CASE" SO-CALLED

The information filed with the court was printed in XXXVI M.L.Q. No. 3, October 1951, pp. 7-11. As headlines and news comments are not always accurate we suggest that the entire document be read and every sentence weighed and considered as it was obviously weighed and considered by the Chief Justice.

INTRODUCTORY NOTE ON THE NATURE AND HISTORY OF INQUIRIES INTO THE CONDUCT OF LAWYERS.

The questions and comments which have reached us indicate again that some lawyers not only have short memories but have not fully grasped the nature of a lawyer's status in its relation to the public interest and the court's responsibility as to membership in the bar. Accordingly, we not only reprint for convenient permanent reference the full report by the Chief Justice. but also remind the newer members of the Association, in the public interest, of what happened only about twenty years ago when the entire legal background of the recent proceeding was explored, stated and submitted in print to the bench and bar in the "Quarterly" from 1928 to 1933 when the community was startled by the disclosures of "jury fixing" before Commissioner Carpenter.

While the younger members of the bar may never have read about it and older members may have forgotten it, in 1931 there was a rising tide of public criticism of the administration of justice. A committee consisting of members of the Governor's Safety Committee, of the State Insurance Department, of the Registry of Motor Vehicles, of the Boston Chamber of Commerce, of the Massachusetts Medical Society, of insurance companies and others, a committee of which Hon. Frederick W. Mansfield, then president of the Massachusetts Bar Association, was chairman filed a petition for an inquiry by the court into alleged abuses.

This petition alleged that "for some years past and especially since the taking effect of the compulsory motor vehicle insurance law in 1927, there has been constantly increasing public criticism by Governors of the Commonwealth, commissioners of insurance, the attorney-general, members of the bar and laymen, and editors of the public press, of the unsatisfactory administration of justice in the commonwealth in connection with the solicitation, preparation, presentation and disposition of claims for alleged personal injuries and property damage."

In support of the petition Mr. Mansfield submitted the following memorandum which was printed with the petition and the order of court thereon in the "Quarterly" for February 1932, Vol. 17, No. 2, pp. 40-48.

"Members of the bar are 'officers of the court' all of whom have qualified upon admission by taking the oath set forth in G. L. Chap. 221, S. 38. They are individually and collectively subject to 'inquiry' by the court upon its own motion or upon information presented to it by members of the bar or other citizens. (See Matter of Casey, 211 Mass. 187, at pp. 191-193, Matter of Cohen, 261 Mass. 484, Matter of Ulmer, 268 Mass., at p. 392.) There are no parties to such proceedings. The petitioners for inquiry act simply in the position of *amici curiae* for the assistance of the court. Inquiry by the court similar in character to the one suggested has been conducted in Wisconsin, in New York, and elsewhere, and the jurisdiction and powers of the courts in such proceedings have been fully sustained by the Supreme Court of Wisconsin in State vs. Circuit Court of Milwaukee County, 193 Wis. 132, 214, N.W. 396 and Rubin vs. State, 194 Wis. 207, and by the opinions of Dowling, P.J. for the unanimous Appellate Division of the Supreme Court of New York and subsequently by the opinion of Chief Judge Cardozo for the unanimous Court of Appeals of New York, the latter opinion being reported in 248 N.Y. 465, 162 N.E. Rep. 487. A report by Judge Wasservogel, who conducted the New York investigation, is reprinted in the Massachusetts Law Quarterly for November, 1928, and the report of a similar investigation in Philadelphia, containing a detailed account of conditions there discovered, appears in the Supplement to the Massachusetts Law Quarterly for No-

vember, 1928. A discussion of conditions believed to exist in connection with motor vehicle accident claims in many large cities including the Metropolitan District of Boston, appears in the report of the Special Commission on Motor Vehicle Insurance Law in Massachusetts (Senate 280 of 1930, reprinted in the Massachusetts Law Quarterly for February, 1930, see pages 73 to 87, 123 to 125, 249, 257).

"The disciplinary power of this Court is not merely passive; it does not have to rest inert until some third party calls it into action. It is settled that the Court may act *sua sponte*, and it has the inherent power to grant the relief prayed.

"Cartwright's Case, 114 Mass. 230.

Boston Bar Association vs. Casey, 211 Mass. 187, 192, 193.

Matter of Cohen, 261 Mass. 484, 486.

Matter of Ulmer, 268 Mass. 373, 392."

The unanimous opinion by Cardozo, C. J. of the New York Court of Appeals in the Karlin case 248 N. Y. 465 growing out of the ambulance chasing investigation, concurred in by Pound, Crane, Andrews, Lehman, Kellogg and O'Brien J. J. was also reprinted in full in the same "Quarterly", pp. 48-58.

Several disbarments resulted from the court hearings following Commissioner Carpenter's reports. The procedure was further discussed in the opinions in two of these cases referred to by the Chief Justice. The whole subject was further discussed in the memorandum submitted to the court in 1942 by the Massachusetts and Boston Bar Associations which led to the opinion of the court in 313 Mass. 186.

This memorandum was printed with the final opinion of the court (314 Mass. 544) in 28 M.L.Q. No. 4, December 1943, pp. 3-32 in order that the bar might be fully informed. With all this background, as explained by the Chief Justice, there was "nothing extraordinary about the procedure adopted" in the "Cenedella" matter. The only unusual feature of the proceeding was that it was conducted in public by a member of the court for reasons stated by the Chief Justice instead of being referred to a commissioner. F. W. G.

THE FINDING OF CHIEF JUSTICE QUA

IN THE MATTER OF INFORMATION OF THE MASSACHUSETTS BAR ASSOCIATION RELATIVE TO THE REPORT OF THE COMMITTEE ON RULES OF THE HOUSE OF REPRESENTATIVES, NO. 2696.

FINDINGS, ORDER OF COURT

This matter came on before me under the order of the court dated Oct. 9, 1951.

As appears from the order, the proceeding was solely in the nature of an investigation or inquiry into the entire subject matter of the information and of the documents referred to therein. This subject matter has to do with the conduct of the three persons named in those documents, to wit, Alfred B. Cenedella of Milford, John S. Derham of Uxbridge, and Francis E. Kelly of Boston. All three are members of the bar of this Commonwealth. It also happens that Mr. Cenedella is the District Attorney for the Middle District, Mr. Derham is the judge of the Second District Court of southern Worcester, and Mr. Kelly is the Attorney General of the Commonwealth. This inquiry is designed solely to elicit facts and evidence upon which the court can determine whether proceedings are justified looking toward the disbarment or discipline of any of these persons as members of the bar. It is not the function of this court to make general investigations into the conduct of public officers as such. The conduct of any of these persons in respect to his office has been investigated in so far as it might bear upon his personal fitness to remain a member of the bar or his amenability to discipline as such a member.

Moreover, the hearing before me was purely investigatory. No formal charges had been made against anyone. The information itself was too broad and indefinite to be construed as making any charge against anyone sufficiently accurate for purposes of trial. The question now is whether there is a sufficient background of apparently credible evidence to justify the making of such charges. In keeping with the nature of the proceeding as purely a preliminary investigation and in no sense a prosecution, all evidence was introduced by counsel appointed for that purpose by the court. No cross-examination was allowed and no exceptions were recognized. This method

of procedure was necessary. It was obvious from the beginning that the investigation must take a wide range. No charge was pending against anyone. It would be practically impossible to carry on such an investigation and at the same time to hold a trial, with all its ordinary incidents, of persons against whom no charges had as yet been formulated and against whom none might ever be formulated. The attempt to do these two things at the same time would have destroyed the investigation. In order, however, that the court might be as fully informed as possible, counsel for the three men named in the documents were allowed to be present and to make such suggestions as they desired to make as to witnesses to be called and subjects to be inquired into, and they were permitted to argue at the close of the evidence. In the proceedings to be undertaken in pursuance of the order hereinafter contained the respondent therein named will of course have all the rights to cross-examine witnesses and to introduce witnesses of his own and to save exceptions that any defendant has in any ordinary trial, and no findings I now make will have any force or effect whatever in that proceeding.

There is nothing extraordinary about the procedure here adopted. It follows the precedents in this Commonwealth and elsewhere. Matter of Keenan, 287 Mass. 577, 585-587. Matter of Mayberry, 295 Mass. 155, 161-162. People v. Culkin, 248 N. Y. 465. In re Disbarment Proceedings, 321 Pa. 81. The only features that might be thought unusual are that the investigation has been conducted by a judge of the court instead of by a commissioner appointed by the court; that the persons named in the information have been allowed to be present throughout and to make suggestions, and to argue, instead of being excluded altogether (except when called as witnesses); and that the public has been admitted. The reasons for conducting the investigation in public are to be found in the history of the last few months. There had already been an investigation by the committee on rules of the House of Representatives, whose reports had been made public, together with the transcript of the evidence before the committee. There had been action thereon by the House of Representatives, which had refused to accept the report of the majority of its committee and had referred the whole matter to the Massachusetts Bar Association, which in turn filed the information in this court. There

had been a great deal of publicity about the whole matter including the names of the persons now named, and the reasons which usually advise secrecy did not exist. A secret investigation by the court would have been unfortunate, especially if no cause for proceeding against anyone had been found. An impression of concealment would inevitably have been created. The reasons which usually call for publicity in judicial proceedings seemed to apply in full force.

It is proper to add that any unprofessional conduct on the part of any members of the bar occurring in the course of this present inquiry, as in the course of any other judicial proceeding, is open to consideration and may itself be made the subject of charges, if charges appear to be warranted. Matter of Sleeper, 251 Mass. 6.

The investigation was most ably conducted by counsel and was most thorough. More than 60 witnesses were called. The transcript of the evidence taken and of the arguments fills 2172 pages. There were introduced 111 exhibits. Every known source of information seems to have been explored. Whatever may be revealed in the future, it does not seem that at the present time, any more light can be thrown upon the subject matter than has already been thrown upon it by the diligence and skill of investigating counsel.

It is not my purpose to review at this time the mass of evidence or to make detailed findings upon it, especially in view of the very limited purpose that any findings now made by me can serve. It seems, however, that I ought to go far enough to indicate briefly the reasons that have led me to the conclusions as to future proceedings hereinafter set forth. I shall, in general, confine my findings to matters not in dispute or so thoroughly established as to be practically indisputable, and to statements of issues as to which there seems to be or not to be, sufficient evidence to warrant proceedings against a named respondent.

In the latter part of 1949, the Commonwealth took for highway purposes a house and several parcels of land in Uxbridge, belonging to Waucantuck Mills, which thereupon employed Derham as its counsel to press its claims for damages against the Commonwealth. A petition was brought. At first the mills placed its damages at $31,000 Derham secured from the commissioner of public works what amounted to an offer to

pay $14,000. An agreement was then made between the mills and Derham that the mills would take $14,000 net to it and that Derham would pay the expenses and could have all he could get above $14,000. The question at once arises whether this agreement was champertous and illegal. The case came on for trial in the Superior Court at Worcester, June 13, 1950. A jury was empaneled and a view was taken. Kelly had authorized Alpert, the Assistant Attorney General who was to try the case for the Commonwealth, to offer approximately $17,000, but Derham would not take this. In the interval before the taking of testimony actually began, Derham pressed Alpert to call Kelly on the telephone and get authority to offer more. Alpert did so, and Kelly authorized him to pay under $20,000. Alpert offered $19,000. Derham agreed to take that sum if $650 were added for certain expenses and Alpert agreed. The case was settled between counsel for $19,650. There was much evidence tending to show that this settlement was too high. The Commonwealth had made three appeals, two of which were between $13,000 and $14,000 and the third only $2885. The property was in poor condition. Derham's own appraiser, one O'Connell, had appraised it at $14,300, which, however, he finally worked up to $21,300 by adding an item of $7000 for so-called "consequential damages," the basis for which is not clear.

The next step was to have the settlement to which counsel had agreed translated into a verdict of the jury. Counsel for both sides appeared before Judge Hudson, who was holding the session. Alpert stated two of the appraisals the Commonwealth had. In answer to a question by Judge Hudson, Derham stated that his "figures" were $26,400, and that his appraiser was O'Connell. In the context "figures" can be found to have meant appraisal. As the close of these statements by counsel, Judge Hudson indicated that he was satisfied and directed the jury to return a verdict for the petitioner for the sum agreed upon. There was much evidence that O'Connell had never given Derham an appraisal as high as that, and that Derham could have had no more than a faint hope that he ever would do so. In fact, O'Connell's final appraisal, which came to Derham a few days later, was $21,300, as hereinbefore stated after O'Connell had raised his estimate as high as he could persuade himself to go. There is evidence that

Derham, in violation of his duty as an officer of the court, attempted to deceive Judge Hudson as to the value of the property and as to the evidence which he had available to prove that value. I make no finding as to whether he did or did not so attempt to deceive, but I do find that there is evidence to justify a charge against Derham on this ground and to require a trial of that issue and to require him to present his defense.

The settlement was actually completed by payment early in August. By Aug. 7 Derham had received the check of the Commonwealth for $19,698.65, the amount agreed upon with a few dollars added for interest and costs. The check was payable to Waucantuck Mills. On Aug. 7 Derham visited the mills, left the check there, and received a check of the mills payable to himself for $5698.65. This was in accordance with his agreement with the mills that he should receive all sums recovered from the Commonwealth over and above the $14,000 net which the mills had agreed to take. On the same day, which was Monday, he deposited the check for $5698.65 in his bank account and drew upon that account two checks, each for $1000, one of them payable to his associate, one Buckley, an attorney who had helped him on the Waucantuck Mills case and other cases, and the other payable to himself, which he cashed, taking away the $1000 in cash with him. These two checks would together make up the sum of $2000 which, as hereinafter appears, Derham is reported as having said he intended to pay Kelly as a bribe. I am satisfied, however, that the proceeds of the $1000 check to Buckley were, in fact, used by Buckley for his own purposes and did not come back to Derham. This sum was in payment for various services rendered by Buckley to Derham, including, but not confined to, services in the Waucantuck Mills case. I do not consider this check to Buckley as having any significance in this investigation. The sum of $1000 in cash which Derham took from his bank on Aug. 7 will be mentioned again later.

For many years Cenedella and Derham had been intimate friends, and their wives had been perhaps even more intimate friends. There is strong evidence tending to show that on the morning of Tuesday, Aug. 8, 1950, the day after Derham had taken from his bank $1000 in cash, Cenedella drove from the beach, where he had been staying, to Worcester to attend a special sitting of the Superior Court for the disposition of cer-

tain criminal cases. Cenedella has previously testified before the committee on rules of the House of Representatives at the investigation by that committee hereinbefore mentioned that this date was Aug. 28, the day of the regular criminal sitting of the court; but there is evidence which in my opinion tends strongly to show that this was a mistake on his part and adequately to explain the reason for the mistake. On his way Cenedella stopped at Derham's house in Uxbridge, left there a suitcase containing laundry which Derham's son had requested Cenedella to bring up from the beach, and had a cup of coffee in Derham's kitchen with Mrs. Derham. Derham agrees that Cenedella did call at his house and leave his son's laundry while Derham himself was in the house, but he testified that he did not remember that he met Cenedella at that time, and he has not conceded that the date was Aug. 8 instead of Aug. 28, as first stated by Cenedella. Cenedella testified before me that as he was leaving Derham's kitchen to resume his journey to Worcester and was walking with Derham toward Cenedella's automobile, which was parked in the yard, the following incident occurred. Cenedella asked Derham if he was coming to Worcester, and if he had anything before the court. Derham said "No," that he had to go to Boston to see the Attorney General, and then he pulled out some bills that were folded in the middle in a roll, saying, "It's $2000." Cenedella said, "Where did you get that fee?" Derham said, "It isn't a fee. I have to take it in to Frankie Kelly." He said something about the Waucantuck Mills. Cenedella said "What?" Derham said,, "You don't get favors there unless you pay for it." Derham denies that any occurrence of this kind took place. He denies that he showed any money to Cenedella and denies that he made the statement about intending to pay any money to Kelly, or not getting favors unless you pay for them.

In the spring of 1951, which would be about 10 months after the foregoing conversation, if such conversation took place, Cenedella was investigating so-called rackets in Worcester county, in connection with which he asserted that he needed additional legislation. This led to his appearance on June 14, 1951, before the committee on the judiciary of the House of Representatives, who were considering certain bills to establish a commission or authority to investigate crime in this Commonwealth. As bearing upon the subject Cenedella made

a statement in some form to the committee indicating or implying that he had learned from a friend of his that graft was about to be paid to a high State official. This in turn led to the passage by the House on June 21, 1951, of a resolution ordering its committee on rules to investigate the matter. On June 27 Cenedella was called to testify before that committee and testified to his talk with Derham substantially as he testified before me, except that he then placed the date as Aug. 28, 1950, instead of Aug. 8, 1950.

Even if this talk took place, and if what Derham said to Cenedella was true, in my opinion that would constitute no evidence that Derham actually did offer a bribe to Kelly or that Kelly requested or accepted a bribe from Derham. At most it would constitute evidence that Derham expected and intended to pay money to Kelly out of the proceeds of the Waucantuck settlement. If he had that intent, he may have changed his mind and abandoned his intent when it came to the point of execution. If evidence that a crime was contemplated were to be considered evidence that it was committed many a man who has committed no offence might be subjected to punishment. Moreover, if the talk took place, Derham may have spoken in spirit of bravado and with no serious intent at the time to do what he said he was going to do. In my opinion there is no evidence to justify a charge against Derham that he actually offered the money to Kelly or against Kelly that he requested or received it. Reference will be made later to certain conduct of Kelly which it has been suggested has some tendency to support a charge against him.

Nevertheless, it must have been plain to both Derham and Cenedella that the issue, whether or not this talk took place, went to the root of the entire investigation both before the House committee on rules and before this court. Before both tribunals Cenedella asserted that it did take place, and Derham denied it. This contradiction about such a matter could hardly be the result of misapprehension or lack of memory. It would seem that one or the other cannot be telling the truth. If there were merely a contradiction between these two men with nothing more to put into the scales, the conclusion might follow that the truth could never be discovered and that proceedings against either would be useless. The evidence I have heard, however, forces me to the conclusion

that this is not the situation, and that there exist some substantial considerations tending to support Cenedella. To begin with, it would be a very unusual thing for any man to make up out of whole cloth a story of this kind involving one of his most intimate friends and bringing, as Cenedalla's story obviously has, a great deal of sorrow upon himself and his wife as well as upon his friend. No motive which seems to me substantial or plausible has been advanced why Cenedella should make a false accusation of this kind and should select Derham to be the victim of it. On the other hand, Derham's motive for denying the conversation, even if it occurred, is obvious enough. Then again, after Cenedella's appearance before the House committee on the judiciary on June 14, 1951, where he made the statement that a friend had told him about graft involving a high State official, Derham, who had not previously been in the best of health, but had been up and about, became very nervous and, on June 23, two days after the adoption of the resolution for an investigation by the committee on rules, was taken to a hospital, where he was treated for his nervous condition.

There was evidence that on June 26, the day before Cenedella testified before the committee on rules, before Derham had been named to any committee, and at a time when, according to his testimony before me as well as before the committee on rules, he had no idea that he was going to be named, Derham told his physician, who was trying to find out the cause of his excessive nervousness, that "he thought he might be named in connection with this case." Another fact, not disputed, that may be thought of significance, is that on Aug. 7, the day before the day when Cenedella now says this talk took place in Derham's yard, Derham had drawn $1,000 (but not $2,000) in cash from his bank as part of the proceeds of the check given him by Waucantuck Mills out of the settlement money. Derham admits this. It is therefore an established fact that, unless Derham had disposed of it in the meantime, he actually had on the morning of Aug. 8, $1,000 in cash, which he could have shown to Cenedalla. It is possible, of course, that he had more. When Cenedella first told his story of his interview with Derham and of Derham showing him a roll of bills, he could not have known, if the story was false, that Derham actually had on hand at any time a

substantial sum in cash derived from the proceeds of the Waucantuck settlement. Yet there is a coincidence between Cenedella's story and the fact now known that immediately after receiving the Waucantuck money, Derham drew $1,000 of it in cash. I do not attempt to state all the evidence tending one way or the other, and I do not find whether or not the conversation took place; but I do find that there is a substantial issue to be tried as to whether it did or did not take place, and as to whether Derham has testified falsely both before the committee on rules and before this court in denying that it took place. In my opinion, he should answer to charges on these points and be given an opportunity to be heard and to present his defense.

This leads at once to another issue closely connected with what has just been said. It is apparent in the circumstances that a question of great importance in this proceeding is what Derham did with that $1,000 which he drew in cash on Aug. 7, 1950, from the proceeds of the Waucantuck settlement, Derham testified that he considered that an important matter. He was questioned about it at great length both before the committee on rules and before me. He had ample time to consider it. It would seem that the drawing from a bank of $1,000 in cash to take away is not so common a thing as to leave no impression upon the memory. Yet Derham has never given a satisfactory account of what he did with that money. He told the committee that he had taken it to Narragansett to the races, but could not recall whether he won or lost or how much. He later told them that if Narragansett was closed he went to Rockingham; that on Aug. 7 or Aug. 8, he went to whatever race track was open; that if Suffolk Downs was open, that was where he went. Before me he testified that he did not go to the races Aug. 7, but thought he did go to Rockingham Aug. 8, and that on Aug. 8 or thereabouts he gave over $500 of that money to his daughter to buy clothes and for a trip to Sault Ste. Marie, Canada. When, however, records of the Trans-Canada Airlines were produced to the effect that his daughter was already in Canada by Aug. 4, three days before he cashed the check for $1,000, he still said that he thought he gave her $550 out of that Waucantuck cash before she went to Canada, but if he did not, he lost all of the cash at the races. He testified before me that he could remember

no other instance where he had taken $1,000 to the races and that his testimony before the committee on rules that he had done so at other times was not correct. He has never given any details of his betting or his losses. Although Derham's failure to account for this money does not show that he paid it to Kelly, his testimony does in my opinion present issues whether he has testified falsely before the committee or before this court, or both, as to his disposition of this sum of $1,000, and whether he has in accordance with his duty as an attorney aided the court in the discovery of the truth in this investigation, or has on the contrary obstructed the discovery of the truth. In my opinion he should answer to charges on these points and be given an opportunity to be heard and to present his defense.

I do not believe that there is any substantial prospect that Cenedella could be proved affirmatively to have testified falsely about his talk with Derham, even if on a hearing the evidence against Derham should be found insufficient to hold him.

It has been suggested that the conduct of Cenedella is open to criticism at other points. It has been argued that, if the disputed talk took place, he should have investigated fully with a view to prosecution. There is evidence that he did cause some investigation to be made into the settlements of land damage cases, but he never carried it very far. On the other hand, it must be recognized that Cenedella's position was a difficult one. In the event of an attempted prosecution by him, his own testimony would be the principal evidence. It would be opposed by the testimony of Derham. Cenedella had no evidence that a bribe had actually been paid, and did not himself know whether such was the fact. The subsequent conduct of Derham and his evasive testimony in the two investigations did not occur until 1951, when the whole matter was already under investigation by the committee on rules. Any prosecution by Cenedella would have involved his naming of Kelly who was his superior officer and who would be in a position to block effective proceedings. See G. L. (Ter. Ed.) c. 12, s. 6, 27; Commonwealth v. Kozlowsky, 238 Mass. 379, 385-391. Whether Cenedella should have pursued his investigation further was a matter of policy and judgment and relates to the manner of conducting his office and so is outside the scope of the present inquiry. He seems to have believed

with much justification that he did not have enough evidence and was not in a position to get enough evidence to justify the attempt to secure an indictment or even to continue his investigation.

Cenedella's testimony before me does not entirely agree in every respect with that given by him before the committee on rules, particularly with reference to whom he had previously told of his alleged talk with Derham, but such differences do not relate to matters vital to the inquiry. They are such as might be explained by mistake, inadvertence, misunderstanding or forgetfulness. They do not indicate a fixed and definite purpose to deceive. They are such as often occur with honest witnesses. Cenedella's testimony before me as to whom he had told of his alleged talk with Derham was for the most part well corroborated. I do not find in these discrepancies any substantial evidence of a dishonest intent to deceive. In my opinion there is not enough in them to warrant consideration.

I do think that Cenedella's conduct in writing a congratulatory letter to Derham upon the latter's appointment as a District Court judge in 1951 and a laudatory address given by him at a dinner tendered to Derham were in poor taste and open to criticism, if the talk with Derham to which Cenedella testified actually took place and to some extent the letter and address tend to weaken his testimony as to that occasion. Here again, however, the difficult position in which Cenedella found himself must be considered. He and Derham were still outwardly supposed to be friends. Honest men do not always adhere literally to the truth at such times.

In my opinion the investigation has not disclosed adequate ground for disciplinary proceedings against Cenedella.

Kelly was examined at length and searchingly as was proper, for the purpose of discovering, if possible, any evidence that he had received money from Derham. It appeared that he had deposited considerable sums of money in cash in his bank account at different times but attempts to connect this with any money received from Derham were unsuccessful. As I have already said Derham's statement if he made it, that he was going to pay money to Kelly is not evidence that he did pay money to Kelly or that Kelly requested money from him. It has been suggested that Kelly's conduct in appointing assistant attorneys general to investigate Cenedella's manner

of conducting his office in Worcester indicated a consciousness of guilt on Kelly's part and that his real purpose was to head off any indictment against him by the Worcester grand jury. I think it probable that what Kelly did was his manner of reacting to what he conceived to be an attack upon him by Cenedella but it would be going beyond the proof to ascribe it to consciousness of guilt in connection with any bribe by Derham. Kelly may have testified reluctantly on some points, and may not have been wholly accurate on others, but as I have already said of Cenedella's testimony I do not find in it any sufficiently clear and definite purpose to deceive the court in any matter of substance. It is argued that Kelly's statement to the committee on rules and his press releases in connection with his investigations of Cenedella were exaggerated. intemperate and unwarranted and this may be so, but I do not find in them an adequate basis for disciplinary proceedings against him as an attorney at law. It has been argued that there is sufficient evidence of a conspiracy between Kelly and Derham. There is evidence of a number of facts that would fit into this theory if there were sufficient evidence of the conspiracy itself, but I do not find sufficient evidence of conspiracy.

It is therefore ordered that notice be given to the said John S. Derham to appear before the justices of this court to be holden at Boston within and for said County of Suffolk on the first Monday of March next, by serving him with an attested copy of this order 14 days at least before said first Monday of March, that he may then and there show cause why he should not be disbarred or otherwise disciplined as an attorney of this court for one or more of the following causes, to wit:

1—For having entered into and carried out a champertous agreement with Waucantuck Mills to carry on a petition for land damages against the Commonwealth;

2—For having attempted to deceive Judge Hudson of the Superior Court as to the propriety of the settlement of said petition by asserting to Judge Hudson that he, Derham, had an appraisal of the property in question at a value substantially higher than any appraisal which he in fact had;

3—For having testified falsely under oath before the House committee on rules or before this court, or both, that a conversation as alleged, or substantially as alleged, by Cenedella

relative to Derham's intent to pay a bribe did not take place between him and Cenedella in August, 1950.

4—For having testified falsely before this court or before the House committee on rules, or both, as to what became of $1,000 in cash which he drew on Aug. 7, 1950, from the proceeds of the Waucantuck settlement;

5—For failing in his duty to assist the court, or in obstructing the court, in discovering the truth about his disposition of said sum of $1,000.

Notice to show cause having been issued, the respondent resigned from the bench and, as reported in the press, owing to ill health, did not appear to show cause and an order for disbarment was entered by the Court.

COMMITMENT OF THE SEX OFFENDER IN MASSACHUSETTS*

By WILLIAM J. CURRAN, *of the Boston Bar*

In 1947, as a result of considerable public clamor for legal checks against sex crime, a new and highly controversial procedure for the commitment of sexual psychopaths became a part of the General Laws of Massachusetts as Chapter 123A.

Under this procedure, the so-called "psychopathic personality" can be committed to a mental institution by a judge of probate on a petition brought by the district attorney. The chapter makes elaborate provision for notice and a hearing on the commitment. The psychiatric examination is conducted by two court-appointed physicians certified by the Department of Mental Health.

The chapter adopts the term "psychopathic personality" to identify a commitable sex deviate. The term is defined in Section 1 of the Act as follows:

> "Those persons who by an habitual course of misconduct in sexual matters have evidenced an utter lack of power to control their sexual impulses and who, as a result are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desires."

The law is a step into a new field of law making. Through it, the legal order for the first time recognizes a "twilight zone" between sanity and insanity—heretofore quite rigid legal catagories. In truth, this law does so in an awkward and oblique manner. It might be said that the law merely adds another mental category to the already too long list of Massachusetts commitment procedures. Actually, it does much more and for this reason it deserves more than cursory examination.

The term "psychopathic personality" is a loose term, even in medical circles. It has no clear meaning, no dynamic significance. In general, it is used to connote *any* type of mental ill-balance or mal-adjustment, usually characterized by immaturity and egocentricity, but not sufficiently serious to be called psychotic (insane). Quite often, these persons exhibit what seems to be a complete inability to control their emotions, or, they at least do not seem to be able to comprehend any reason for not doing as they please. Often they will exhibit aggressive antisocial sexual impulses, but this is *not always the case.* It is this latter characteristic which has prompted the draftsmen of some of these commitment acts to adopt the term to describe the committable sex deviate.

The use of the *generic term* to describe only one part of the class the term is meant to include is most unfortunate. It hinders future development in the law concerning the generic psychiatric classification. It makes awkward the task of the psychiatrist commissioned to examine the subjects under the law, since he is required to make his report with the language of the statute in mind.

It has been asserted above that this law invades the twilight zone between sanity and insanity and their legal consequences. It does so by providing for the commitment of a person found to be unable to control his own conduct in sex matters. It specifically provides, however, that the finding of a judge that a person is a "psychopathic personality" does not constitute

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* This article was prepared as a part of a graduate research project by the author at Harvard Law School in 1951, and during association as a Staff Member of the Massachusetts Special Commission on the Structure of the State Government. A special debt of gratitude is due to Robert H. Hamlin, M.D., of Harvard for his invaluable assistance and inspiration.

a defense to crime without a *further* finding that the person "is in a condition of insanity, idiocy, imbecility or lunacy."

Before considering the merits of this provision, we must examine the language used. The terms chosen are extremely poor. We are concerned here with legal responsibilities, but the draftmen leave that determination to a psychiatrist. They attempt to use his technical language in an effort to delimit his area of examination, but they use it in a clumsy manner, leaving contradiction and confusion as the result. The statutes say that the "psychopathic personality" is not excused from punishment for crime unless he is "insane." And yet, to a psychiatrist, the term "insane" has no medical meaning. It is in essence a *legal term* expressing the result of the very thing that the statute here considered is trying to have determined, that is, the legal responsibility of the individual. The term actually has significance only to identify a person who is *not legally* responsible for his actions by reason of his lack of mental capacity. The term can be no further defined in medicine or in the law of the state. The psychiatrist is therefore left without any medical standards to apply to the situation.

The next three terms mentioned in the statute merely add to the confusion. The law reads that a "psychopathic personality" can be excused from punishment for crime if he is in a condition of "idiocy, imbecility or lunacy." The terms "idiocy" and "imbecility" identify the lowest two of the three grades of mental deficiency (feeble-mindedness). We cannot be sure that it was the intent of the draftsmen to exclude the highest grade, the moron. Some of the confusion can be realized when it is recalled that many psychiatrists assert that *all* psychopathic personalities are to some extent mentally deficient. However, the last named term, "lunacy", is the most ill-advised of all. It has neither a medical nor a legal significance. It is a relic of the time when ignorance and superstition led people to believe that mental derangement was caused by the cycles of the moon.

The definition of "psychopathic personality" in the statute provides that the person has "uncontrollable desires". A controversy has been raging for many years between the legal and medical professions on the problem of the legal responsibility of the person with "uncontrollable" desires. As yet,

few courts have accepted the existence of such a mental state. It is also a delicate moral and religious question concerned with the freedom of the will. If the condition is recognized to exist through the law here considered, it is difficult to find the grounding in our legal philosophy for the application of criminal sanctions. Criminal punishment is said to be a penalty for *wilful* misconduct applied as a *deterrent* against future conduct of the sort. Such punishment would have little effect on a person found to be a "psychopathic personality" under the Massachusetts law.

The sexual psychopath laws of other states have not adopted the phrase "uncontrollable desires." The language in the Massachusetts Act has an interesting genesis. The entire Act was borrowed almost verbatim from the Minnesota Sexual Psychopath Law[1], but the definition in that Act was *not* borrowed. Instead, the definition of psychopathic personality contained in the Massachusetts Act is taken from the paraphrased *interpretation* of the definition in the Minnesota Act as it was expressed by the Supreme Court of Minnesota and expressly quoted and upheld by the Supreme Court of the United States as constitutional[2].

This was perhaps ingenious draftsmanship, but few of the legal and medical issues here considered were presented to the Supreme Court in that case. The question before the court at that time was the validity of the state's authority to commit such persons. This was upheld as within the police powers of the state. The definition of psychopathic personality and its implications were not put in issue or questioned.

Criticisms of this Massachusetts Act have not only gone to its form, however, but to its substance and the very wisdom of its passage. Actually, most of these criticisms lie against this type of legislation generally throughout the country and not particularly to the Act in Massachusetts. It is asserted that the legislation, now adopted in about a quarter of the states, has been a dismal failure in reducing the number of sex crimes and has produced the adverse result of commitment for life of relatively minor sex deviates whose crimes are misdemeanors.

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[1] Minn. Session Laws, 1939, Ch. 369, Sec. 1.
[2] Minn. ex el Pearson v. Probate Court, 309 U.S. 370, 372, 60 S.Ct. 600 (1940).

A large part of the medical profession and no small part of the legal profession consider *any* such commitment law as this unwise in view of the very limited psychiatric knowledge in the field. Methods of effective treatment for the sexual psychopath have not been devised. A recent legislative commission in New Jersey reports that *none* of the states now having sex deviate commitment laws even *attempts* to give treatment to these persons.[3] Commitments under these conditions amount to no more than custodial care.[4] The commitment is for an indeterminate time and is often referred to as a life sentence. It should be noted at this point that under the Massachusetts Act, the person to be committed need not be guilty of any crime and need not even be charged with any crime.

It has frequently been asserted in adverse criticism of these laws that sex crime and "sex crime waves" in the United States are grossly exaggerated in number and kind.[5] It has been asserted that these laws have been hastily enacted in the heat of passion when some one or perhaps two particularly heinous sex crimes receive considerable public attention. The laws have then either died on the statute books through disuse, or have been used to commit minor deviates whom the law was never intended to affect.

The Massachusetts Act is perhaps open to attack on some of these grounds. The legislative intent in passing the act is not clear, but it would seem that it was intended to provide for the commitment of those sex deviates who are dangerous to society and who are or seem to be recidivists (habitual offenders). Some studies report that recidivism is very slight in sex crime,[6] but there can be little doubt that the laws were written with such a situation in mind.

The awkward and cumbersome provisions of the Massa-

[3] The Habitual Sex Offender, New Jersey Legis. Comm. Report, 1951, p. 4.

[4] In Michigan, a case was carried to the Supreme Court which revealed that these unfortunates were being placed in the State Prison under the same conditions as prisoners. They were in a separate cell block and were called "visitors." See: In re Kemmerer, 309 Mich. 313, 15 N.W. (2nd) 652 (1944).

[5] For a provoking article on this topic done in the style of the Yale Law School jurisprudence, see: Levy, The Origin of Sex Crime Legislation, 5 The Lawyer and Law Notes, p. 3 (1951).

[6] New Jersey Report, op. cit., note 3; but also see: Report of the Governor's Study Commission on the Deviated Criminal Sex Offender, Michigan, 1951.

chusetts Act can be further elucidated. The Act asserts in Section 2 that "except as otherwise provided, all laws heretofore in force relating to insane persons, to persons alleged to be insane . . . shall apply in like force . . ." to the persons under this Chapter. By making this provision, the law compounds the confusions wrought throughout Chapter 123 of the General Laws, the Chapter on the Mentally Ill, one of the longest and most complicated Chapters in the General Laws.

The judge on the bench cannot help but wonder what kind of proceding he is expected to conduct under the Act. It may seem to be a criminal trial as the district attorney brings in his "petition" for the commitment. A jury trial is authorized at the discretion of the judge. At the hearing, it is competent to introduce evidence of the commission by the person "of any number of sex crimes." And yet, this proceeding is in a *probate* court. The person need not be charged with any crime and no crime need be proved to authorize his commitment. And again, though this may seem to be a criminal trial, the law "borrows" the provisions of the laws on insanity, but a finding of "psychopathic personality" is neither a finding of insanity nor a defense to crime.

The task of the district attorney in the determination of when such a "petition" as this should be brought is no less complicated. He has little to guide him in the use of the procedures.

Perhaps what has been discussed here is some explanation of the fact that the law has been used to commit only one person since its enactment in 1947, supposedly in the face of a "crying need' for such legislation.

It would seem that the Massachusetts Act causes far more difficulties than need be in its attempt to use technical terms and gather definitions. A far more competent job should have been done, particularly in the awareness that this was a legislative step into previously untrodden ways. Or perhaps this awareness of which we speak was not present.

Editor's Note

As there appears to be "a dearth of legal literature on the subject of sex," attention is called to a book on "Sex and the Law," by Judge Morris Ploscone, of New York; Prentiss-Hall, Inc, 1951, which is reviewed in the Harvard Law Review for March, 1952—vol. 65, No. 5, of 97.

CENTENNIAL REMARKS ON THE MASSACHUSETTS PRACTICE ACT OF 1851

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INTRODUCTORY NOTE

The following article was received in 1951 from Mr. Leach, who wrote that he became interested in the subject in the course of research for a biography of B. R. Curtis which he is writing. It is now printed *nunc pro tunc* as both the Practice Act and Work of Benjamin R. Curtis and his fellow commissioners, Reuben A. Chapman and Nathaniel P. Lord, deserve centennial appreciation in Massachusetts. It is interesting that this appreciation comes from Georgia. Brief notes by Mr. Black and the Editor are added after the article.

EDITOR.

THE PRACTICE ACT OF 1851

This year marks an anniversary of importance in the legal history of Massachusetts, for it was just one hundred years ago this spring that an "Act to Amend some of the Proceedings, Practice and Rules of Evidence of the Courts of This Commonwealth", more commonly known as the Practice Act of 1851, was guided through the legislature and began to bring simplicity into the state's judicial proceedings. In the century since its passage, the soundness of its principles, still basic to Massachusetts practice, has been demonstrated. Many the lawyer who has had cause to be grateful that it "retained for Massachusetts the simple outlines of common law pleading at a time when other States were laying foundations for endless confusion . . . by attempting to codify everything in sight,"[1] and who has learned that its operation has helped "to make life more convenient for the entire Massachusetts bar from that day to this".[2] Perhaps no other law which has

[1] "Judge Miller and Chief Justice Taney," *Massachusetts Law Quarterly* 1: 191 (May, 1916).

[2] Albert Bushnell Hart, ed., *Commonwealth History of Massachusetts* (New York, 1930), vol. 4, p. 64.

reached the venerable age of one hundred has been of such continuing importance and is as deserving of honor on its centennial.

The Massachusetts Practice Act of 1851 was the result of a general demand for reform in the field of evidence and practice, which had earlier been adapted from English common law. The basis of common law procedures was the technical and complex art of special pleading. It had been perfected in England by the time of Edward III's reign, and both there and in America, skill in pleading had long been the boast of a good lawyer, and the outward sign of a lawyer's merit to others. Not all were masters of it, however, and to the layman, it seemed an inexplicable maze, which kept them from understanding the operation of the law, and which lent truth to de Tocqueville's remark that "The special information which lawyers derive from their studies ensures them a separate station in society, and they constitute a sort of privileged body . . . they are masters of a science which is necessary, but which is not very generally known. . . ."[3] Because of this, the bar quite generally approved of it and was jealous of attempts to change it. The great lawyers, in particular, relied on an acute knowledge of special pleading as a vital element of their success, many feeling that it was "the best logic in the world, except mathematics."[4]

As the bar swelled in numbers toward the middle of the century, and as its business increased in size and in variety, the technicalities of the system became more and more a matter of general concern. Criticism sprang up from many quarters, as more and more cases were lost on technical points of pleading, rather than on the merits. The excessive accuracy required and the subtle distinctions possible in the system frequently resulted in injustice and gradually brought the process into popular disrepute. Justice seemed less important than form, and the real issues of many a contract or commercial law case often remained hidden behind the pleas, rebutters, and sub-rebutters of the arguments.

The first movements for reform in Massachusetts were diverted into a hotly contested quarrel over codification, and

[3] Alexis de Tocqueville, *Democracy in America*, Reeve translation (New York and London, 1900), vol. 1, p. 278.
[4] Mr. Justice Grier, in *McFaul* v. *Ramsey*, 20 Howard 523, 524 (1859).

although in 1836 the General Court passed a law eliminating special pleas as defenses at law, and forcing the general issue to be the only form of defense permissible, little improvement resulted. It was New York who made the first definite contributions to the cause with the passage of what amounted to a new code of procedure, and the legal journals of Massachusetts were quick to sing her praises. The volumes of *The Law Reporter* in the next few years were full of articles on the subject, all of which went to demonstrate that, while on the one hand, there were a great many manifestly wise parts of the common law, there were other rules "which [could] only be understood by reference to the infancy of procedure among the German tribes, or to the social condition of Rome under the Decemvirs."[5] In 1847, *The Law Reporter* was proud to publish a petition of the Suffolk Bar to the General Court, pointing out the accumulation of business in the courts and the attendant serious delays in the administration of justice, and begging the appointment of a commission of inquiry into the whole matter of procedure.[6] But no action was forthcoming.

If the reform movement made slow headway, it at least acquired a champion. A young lawyer, Benjamin Robbins Curtis, already one of the leaders of the Boston bar, and destined later to attain even greater distinction there and in Washington, had been interested in the subject since his arguments in an early case before Judge Story's Circuit Court,[7] and by the time he signed the petition to the legislature, he had become convinced that "a great deal of time and expense" were wasted and that "the whole practice needs a thorough revision."[8] Particularly had Curtis been aroused by the existing modes of bringing parties before the courts, the exclusion because of interest of vitally important witnesses, the limitations on allowable evidence in a number of instances, and the outmoded writs and allegations then in use before the courts. By 1848, he had decided to make the reform cause his own, and in that year, he consented to be "chosen", as his brother quaintly put

[5] Oliver Wendell Holmes, Jr., *The Common Law* (Boston, 1946), p. 2.
[6] *The Law Reporter* 10: 145-6 (June, 1847).
[7] *Cyrus Alden et al.* v. *Timothy M. Dewey et al.* 1 Story 336; 3 Law Reporter 385 (1840).
[8] Benjamin R. Curtis to George N. Briggs, May 3, 1849, Grenville H. Norcross Collection, Massachusetts Historical Society.

it, as a member of the House of Representatives of the General Court "in order to effect some reforms in the practice of the courts."[9] He introduced in the 1849 legislative session a set of resolutions, entitled, "Resolves for the Appointment of Commissioners to report a Reform in Judicial Proceedings," which he felt would set the necessary wheels in motion to secure the needed changes. They asked that the governor be authorized to appoint a commission of three, with power to "revise and reform the proceedings in the courts of justice of this Commonwealth, except in criminal cases, and report the same to the Legislature, subject to its adoption or modification."[10] The resolution passed both houses with almost no opposition.

Shortly thereafter, Governor George N. Briggs approached Curtis on the subject of serving as chairman of the commission, as he seemed the logical candidate for that position. At first, Curtis was hesitant, for he was not inclined to undertake the "labor and responsibility" the work entailed.[11] He consented, however, to serve if he could be sure that the other two members would be actuated by the same zeal he felt and would share his own views on the need of reform. Governor Briggs assured him that whoever he appointed would meet those requirements, and on July 9, 1849, Curtis was formally appointed. Reuben A. Chapman, later Chief Justice of the Supreme Judicial Court, and Nathaniel J. Lord, of the Essex Bar, were chosen to serve with him.

For the next year and a half, the Commission worked in the face of considerable hostility. The greatest source of trouble New York had encountered in adopting its code had been the antagonism of the lawyers and judges, and the situation was not very different in Massachusetts. "To find, as many of these [hostile lawyers] erroneously supposed, all [the] learning of a lifetime rendered useless, was more than human nature could bear with composure. To see the tyro in the profession, made by this change in the law of pleading, as capable of preparing a good declaration, a good plea, or a

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[9] Benjamin R. Curtis, Jr., ed., *A Memoir of Benjamin Robbins Curtis, LL.D.* (Boston, 1879), vol. 1, p. 137.

[10] Junius Hall, *The Act to Amend some of the Proceedings, Practice and Rules of Evidence of the Courts of This Commonwealth. . . .* (Boston, 1851), p. 135.

[11] Benjamin R. Curtis to George N. Briggs, May 3, 1849, *op. cit.*

good bill in chancery, as the patriarch of the bar . . . was very provoking."[12] Many leading members of the Massachusetts bar offered at least rear-guard action. At first, the Commissioners feared such opposition would make it hard for them to get the assistance and advice they needed, but they soon received help and encouragement from many quarters. All of them made as many personal contacts as possible, which helped to mitigate the hostile efforts of the opposition. Curtis, for example, wrote to Chief Justice Shaw, and to a considerable number of other sympathetic lawyers. From Shaw, he asked for "any suggestions which you may think proper to make" and for "the benefit of your valuable experience."[13] Shaw and others were generous with their replies, and by the end of the year the Commission had a considerable pile of data on which to work.

They decided that what was needed was a general simplification of practice and procedure, which through the years had become a patchwork quilt. The most glaring defects seemed to the Commissioners those which clouded factual issues in pleading, and their remedy became the minimum program for revisions. They were the following:

Questions in common law suits were not ascertained and stated before the trial began; thus neither party had any legal means of knowing exactly what was being tried.

Many suits were brought, and more defended, wrongfully, because the parties were not required to state clearly their claims and defenses, and to verify them by a written oath. Conjecture, not knowledge, thus became the basis of many trials.

The discovery of facts was prevented by the fact that "searching interrogatories" could not be put at any time during a trial by the opposite party, and much truth, perhaps even the essence of the case, remained undisclosed and could never be established.

Evidence could only be presented at certain times in a trial. The opposite party was denied an opportunity to use cer-

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[12] Justice Samuel Miller, quoted in Charles Fairman, *Mr. Justice Miller and the Supreme Court* (Cambridge, 1939), p. 24.

[13] Benjamin R. Curtis to Lemuel Shaw, November 3, 1849, Lemuel Shaw Papers, Massachusetts Historical Society.

tain items as evidence at all. Confusion as to the facts, both for the jury and the counsel, resulted.

Bills of discovery were unsure, dilatory and expensive ways of getting at the facts.

Many causes were turned out of court merely because of a blunder made in preparing the plea, declaration, rebutter, etc. Naturally, the "writ-makers" among the members of the bar benefited by the continuation of this system.

Witnesses in many common law actions were barred from testifying because of interest—another way in which the facts of a case were prevented from being drawn out. Fraud was often possible, since persons whose evidence was needed, but perhaps was detrimental to the cause, could be made interested parties, and thus immune. And conversely, persons having a legitimate interest in a case, but who wanted to testify, could release their interest temporarily to enable them to give evidence.

Witnesses were also barred from testimony if they were parties to the action. Charles Warren gives an interesting example of the illogical way this rule worked. Passengers on railroad trains could not recover for loss of or damage to baggage, due to the negligence of the railroad company, because, as parties to the action, they could not put in as evidence the list of items lost or damaged.[14]

These imperfections resulted in injustice at the worst, or in delay, inconvenience, and expense at the best, especially for the ignorant and unwary and became dangerous tools in unscrupulous hands. The condemnation of such obvious flaws in an otherwise just system was unanimous by all those whom Curtis, Chapman and Lord contacted, and they decided to concentrate their attention on them. Curtis was especially anxious to attack them, for he wanted the law to speak the language of justice.[15] In these areas, at least, he felt he could achieve his desire.

The Commissioners spent most of 1850 in drawing up their report and recommendations. To Curtis was entrusted the

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[14] Charles Warren, *A History of the American Bar* (Boston, 1911), p. 474.

[15] *The Law Reporter* 2: 103 (August, 1839). The most often repeated phrase in Curtis' writings is "substantial justice".

preparation of the final report,[16] a model bill and the enabling act, and all three were submitted to the General Court at the opening of the 1851 session. Curtis had been reelected, and since he served as a member of both the House Judiciary Committee and the Joint Special Committee, to which the report was submitted, he was in a position to marshal action to ensure passage of the bill.

The final report proposed considerable change in procedure and aroused extensive debate when made public; but the leading legal journal of the time, *The Law Reporter* referred to "the able and carefully prepared report, which will be much to the public benefit," and assured those suspicious of it that "There is no reason to fear that this report is the result of a rash and ill-judged thirst for reform. The known conservative tendencies, and high professional pride of all the gentlemen on the commission, afford ample reason for confidence in the spirit of the movement."[17] The Commission had been guided throughout by Curtis' caution and his hesitation to become embroiled in an intramural struggle over the most contentious issues, and so had not attempted to do too much at one time. It attacked only the worst evils of the prevailing system, which their research had revealed as most in need of attention. It did not offer a nostrum to cure the common law in Massachusetts; it only attempted a clarification and offered certain correctives for the mistakes time had shown to exist in practice in the state. It did not try to invent new solutions or to import a foreign code. Instead, Curtis had seen to it that the Commission made a pragmatic appraisal of what was possible and then that it remained within those confines. Its recommendations were only for modifications in, and additions to the existing procedure, changes so styled and garbed that approval by even the most crusty member of the bar was possible.

The report began with an historical review of the development of the common law system of special pleading, and of the changes, mostly for the worse, imposed upon it through the years by legislation. Having demonstrated that the existing procedural practices were bad from many angles, Curtis then

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[16] On Procedure. A second report, not written by Curtis, on Equity, was submitted later.

[17] *The Law Reporter* 13:601 (April, 1851).

asked, what kind of procedure was needed. He answered that it must be one which yielded a full exposition of the truth. "What we have to seek," he declared, "is the system which will best attain [justice] at the least expense of time and money, and with the fewest technical rules, which, though necessary to some extent, should not be permitted to work substantial injustice. . . ."[18] Whatever plan was adopted, Curtis hoped it would consider the habits of the people of the state. It must operate so as to save them whatever "delay, vexation and expense" possible, and must be based on practical considerations. "From the days when Mr. Locke created a constitution, down to the production of the last code which came out of the closet of any professor, we believe one important lesson has been taught, that all law should be derived, not created; deduced by experience and careful observation from the existing usages, habits and wants of men, and not spun out of the brains even of the most learned."[19] The plan suggested, said the report, was one retaining the essentials of the old system, but striking out what had been proved unnecessary or harmful. "Legal fictions may be harmless, for they deceive no one; but we do not find them necessary, and they would be a serious embarrassment" in a new and improved code of procedure.[20]

Curtis discussed all the Commission's recommendations in detail, one by one, but he gave the most emphasis to the need for at least some relaxation of the bar of interest against parties. He did not argue for such complete removal as to permit the litigants themselves to appear as witnesses, but to exclude others he thought a bad practice, because "It begets contempt of the law, to see it insisting positively on rules, which a scratch of the pen evades, and tends to fix in the public mind an impression that the law countenances indirection and quibbling . . . [it brings reproach] upon the administration of justice. . . ."[21] To those who, like Curtis, were concerned for the high esteem of the law, that reason alone seemed enough to justify reform. But to admit the evidence of interested parties would go far to secure better justice as well. Curtis thought that everything possible should be done to get at the facts in suits before the courts, for it was just

[18] Hall, *op. cit.*, p. 141.
[19] *Ibid.*, p. 145.
[20] *Ibid.*, p. 147.
[21] *Ibid.*, p. 151.

there that the most injustice occurred. "It is a great mistake to suppose that all justice or all the truth is on one side of every case or even of most cases," he remarked. "By far the larger number have elements of right and truth on both sides, and the grand difficulty consists in finding out which has the most."[22] That was the weakest part of the whole judicial process, and no system of pleading, or any reform in procedure, would serve its true purpose if it did not remove such barriers against the acquisition of truth. The most prominent barrier on the landscape he surveyed was that part of the old system which excluded parties from testifying on account of interest. To secure justice, parties must stand before the law equal in all respects, and that they could not do, if the testimony of some were excluded. The bar and the bench, Curtis cautioned, must be sure that its procedures did not make for inequality and thus for injustice.

In brief, the report recommended the following actions:

1) a reduction in the number of common law actions to three, contract, tort, and replevin
2) authorization for verification by oath of pleadings in demurrer
3) requirement of speedier settlement of all actions
4) provisions of at least two more return days for civil actions
5) guarantee to each party in an action at law of the right to utilize the knowledge of the other by filing written interrogatories
6) alteration of the powers of forcible entry and detainer by the provision of new and summary methods applicable to such actions
7) removal of the rules of exclusion as to witnesses from persons convicted of crime and from those having a financial interest in the litigation.
8) abolition of the tests of interest and infamy, except as to husband and wife
9) provision for direct examination of parties to a suit at common law
10) provision of new forms to make these changes possible.

The act recommended covered these matters and, although the committees to which it was referred deleted some of its

[22] *Ibid.*, p. 153.

126 sections, and amended a few others, the "Bill to Amend some of the Proceedings, Practice and Rules of Evidence of the Courts of this Commonwealth," as reported out and enacted into law, was taken for the most part from Curtis' model bill, exactly as he had phrased it. No major changes were made, and only a few amendments were found to be necessary in 1852 after the legislation had gone into operation. The ideas Curtis, Chapman and Lord suggested remain today at the basis of Massachusetts practice, after one hundred years.

When the bill was before the Joint Committee, Curtis provided explanatory notes, if not able to attend the meeting himself. From these notes, a good insight into what the Commission was after can be gleaned. For example, in justifying the division of common law personal actions into three, Curtis said he hoped thus to make it "real and useful." to make available for every case a "fit guide." Again and again, the notes refer to proposals tending "to promote certainty," "to abolish useless fictions," to achieve the "natural and logical mode" of procedure, to eliminate "prolixity and verbiage," to foster "a safe and speedy despatch of business," and to provide better protection of the rights of the parties to a suit, and the removal of anything which might jeopardize the possibility of achieving justice. He emphasized that if the structure of the house of the law was to be saved, its basement must be repaired, and he offered himself and his fellow Commissioners as repairmen. As it has turned out, they were builders as well.

The Massachusetts Practice Act was substantially a code of civil procedure, similar in many ways to Lord Brougham's Act, passed in 1856 to simplify the procedure in English courts. It changed the way the law operated in Massachusetts almost as completely as the earlier act in New York had done there, and together with the New York act, it served as the basis for similar acts in Alabama (1852), Maryland (1856), and Tennessee (1858). For many years, there was a die-hard element of opposition among some of the most prominent members of the profession. Justice Grier, of the United States Supreme Court, for instance, remained opposed to any changes as late as 1858, when he said:

> "This system [of common law procedure] matured by the wisdom of the ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our States, who have rashly substituted in its place the suggestions of sciolists who invent new codes and systems of pleading to order. . . . The result of these experiments . . . has been to destroy the certainty and simplicity of all pleadings and introduce on the record an endless wrangle in writing, perplexing to the court, delaying and impeding the administration of justice."[23]

The Massachusetts Act, at least, should have been omitted from this criticism, both because, in practical operation, it did not produce the results Grier thought he saw, and because neither Curtis nor his fellow commissioners were sciolists. Their knowledge of the subjects they treated was far from superficial, and the product of that knowledge proved beneficial enough in operation to survive, for it retained the simple outlines of the common law, but not its cumbersome technicalities.

After the Act had been in operation over a year, Richard Henry Dana, Jr., who had "kept a kind of *running account*" of it, thought it had "worked well in the general, with difficulties only in details."[24] He had but few minor changes to suggest and much to praise in the Act as written. "The following seem to me to be [its] invaluable provisions," he wrote:

1. The system of mutual allegations.
2. The affidavit of merits.
3. The keeping cases off the trial list until an issue of fact is made, bona fide.
4. The driving parties to judgment who have no defense.
5. The privilege of interrogating opponent parties.
6. The provision as to the writ of mandamus.
7. The provision for testing an adverse claim to land.
8. Requiring trustees to make a special sworn answer in the first instance.
9. The separation of the process for forcible entry and detainer, from the process for a motion of tenants.

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[23] *McFaul* v. *Ramsey*, 20 Howard 523, 525 (1858).

[24] Richard Henry Dana, Jr., to Whitney Griswold, February 12, 1852, Richard Henry Dana, Jr., Papers, Collection of the late Henry W. L. Dana, of Cambridge, Massachusetts.

10. Abolishing disqualification of witnesses from interest."[25]

Further testing was to demonstrate that its chief recommendations were what Dana thought them to be, "shortening trials, simplifying issues and reducing the number of witnesses."[26] These effects of the Act of 1851 were felt throughout the state's judicial system, and time has not made them any less beneficial. It is only fitting that on the beginning of their second century of operation, the bar—and the public—of Massachusetts should pause and pay tribute to the efforts which produced them so long ago.

Note by Mr. Black

In my opinion the defects which caused the reforms of the Practice Act of 1851-52 were not quite so simple as set forth by Mr. Leach. As I understand it, the virtue of common law special pleading lay in that it presented a *single* issue of fact, upon which both parties decided to rest their case. Today we have gone to the opposite extreme, and many issues may be taken for decision and deliberation into the jury room. This is leading in some states to a development of special verdicts, by interrogation by the court when the verdict is rendered for approval and recording by the court.

The primary purpose of the Practice Act was clarification of factual issues in the pleadings. Mr. Leach speaks of the abolition of special pleas in 1836 and the beginning of the general issue. Thereafter, no plaintiff could tell what was the defense alleged when the general issue was pleaded. Motions for specifications were developed as a tool for the plaintiff to smoke out a defendant who had pleaded the general issue. (See Colby, Mass. Practice 1848.) One of the main purposes of the Practice Act was to obviate the defects of the general issue, and force a defendent to set forth his true defense if any. This was somewhat nullified in 1861 by the opinion in Boston Relief and Submarine Co. v. Burnett, 1 Allen 410, which is the beginning of the "general denial".

As Mr. Leach points out, Curtis and his colleagues did not seek to abolish the common law procedure, but, retaining its simple outlines, sought to correct the blotch made by successive legislatures by piece-meal changes.

As to the history of interrogatories, see Mass. Law Quarterly Vol. 33, No. 1, April, 1948.

That the main purpose of the commissioners of 1851—the clarification of issues—is still the purpose of practical procedural studies—see the recent report of the committee of Federal judges referred to in the "Quarterly" for December 1951, pp. 39-41, which

[25] *Ibid.*
[26] *Ibid.*

is discussed at length in an article in the ABA Journal for April 1952, p. 289. G. K. B.

Note by the Editor

In view of the general wisdom and effectiveness of the report of the Commissioners, described by Mr. Leach, and their emphasis on the need of allowing "interested" witnesses to testify in order to get at the facts, we have always been puzzled by the limitation of their thinking (or vision) which was reflected in their statement that "we do not think it for the interests of justice or the public morals" to allow parties to take the stand. Their proposals for examination of the "parties" who knew most about the facts were limited to written interrogatories. They devoted a page and a half to their reasons for this limitations. See report in Hall's "Mass. Practice Act of 1851", p. 155-6. Parties were made competent witnesses by St. 1856 c. 189, St. 1857 c. 655.

As the view expressed by them was common on both sides of the Atlantic before 1851, we call attention to the story of the change in England in 1851 which led to the change in Massachusetts five years later. This appeared in an account of "Lord Denman and the Law of Evidence" in the "Quarterly" for February 1942 (Vol. XXVII No. 2) in connection with the discussion of the proposed "code" of evidence of the American Law Institute as follows:

> ". . . it is fitting to pay a tribute of respect to the man whose influence in 1851 finally cured, in England, the most 'terrible absurdity,' as Lord Bowen called it, and led the way for the same step forward in Massachusetts in 1856.
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> "Probably, every reader of Dickens was once puzzled, as Mr. Odgers, Q. C., was puzzled. In a lecture, in 1901, he said:
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> " 'When as a boy I read *Pickwick Papers*, I was . . . puzzled to know why Mr. Pickwick did not go into the witness-box, and say that he never promised to marry Mrs. Bardell, and explain how the good lady came to make such a mistake . . . I know now that when *Pickwick Papers* was written neither the plaintiff nor the defendant was ever allowed to give evidence.'*
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> " 'The evidence of interested witnesses,' it was said, 'can never induce any rational belief.'** This view was called by Lord Denman 'as false and insulting.'
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> "Lord Brougham and Lord Denman had been suggesters for years. Denman had retired from the bench in 1850 because of his health at the age of 71, as one of the most respected of English judges. Brougham was still active in the House of Lords and the bill to allow parties to testify, drawn by Mr. Pitt Taylor, became known as Lord Brougham's Act***; but Denman wrote a letter

* "A Century of Law Reform," 203, 216.

** Lord Bowen's chapter in "Select Essays in Anglo-American Law." Vol I 516, 521, 531, and see Blackstone's Commentaries Vol. III chap. 23, p. 371.

*** 14 and 15 Vic. C. 99.

in support of the bill which contributed greatly to its passage, doubtless because the respect for Denman exceeded that for Brougham. As this letter, written after forty years of effort for delayed reform, is one of the most revealing documents in 19th century legal history, and applies to much thinking of lawyers and judges today, we reprint from it. Lord Denman said:

"'I have felt discouragment and even humiliation, at receiving the answer of some of my contemporaries to points which I have thought it my duty to lay before them. "The principle is perfectly right; I can not answer your reasoning, and I see the objection to the present state of law, and none to the change, except that it is a change; yet *I can not bring myself to* concur in it."

"'One particular fallacy . . . I have frequently observed . . . tends to increase the aversion of some judges to change. The system which they find they believe to have been established on full deliberation by the wisdom of former ages; and hence impute to all innovators the arrogance of reversing a decision; *whereas in truth the existing system is for the most part the neglected growth of time and accident . . .*'"****

F. W. G.

**** Arnould's "Life of Denman," Vol. II, 253-4. Law Rev. (1851) 209-211.

1951 SUPPLEMENT TO CROCKER'S NOTES (Second Series)

MASSACHUSETTS CONVEYANCERS' ASSOCIATION

THE SAMUEL T. HARRIS MEMORIAL FUND

Twelve supplements to the Sixth Edition of Crocker's Notes, prepared by the editor, Roger D. Swaim, for the Massachusetts Conveyancers' Association were reprinted, by permission, in the "Quarterly" from 1939 to 1946. (See 31 M.L.Q. Dec. 1946, 42.)

In 1949 these notes, rearranged, enlarged and added to include cases through 321 Mass. and 1948 statutes were published by Little, Brown & Co. in a bound "Supplement" with an article on "The Mechanics of Title Examination", by Richard B. Johnson, and a list of wills construed by the Supreme Judicial Court from 166 to 321 Mass. (continuing the earlier list prepared by Prescott Hall in 1896).

The following additional supplement is the third since that volume. Ed.

The numbers in the left-hand column refer to sections in the book and bound Supplement of 1949. R. D. Swaim.

11 *Eminent Domain*—Discussion of purposes for which private property may be taken. *McLean* v. *Boston*, 1951 A. S. 307.

68 *Resulting Trust*—None found. *Saulnier* v. *Saulnier*, 1952 A. S. 45.

68 *Oral or Constructive Trust*—Application of Statutes of frauds and of family relationship restated. *Ranciar* v. *Goodwin*, 1951 A. S. 97.

76 *Deed*—Executed with blank grantee invalid—rule restated. *Flavin* v. *Morrissey*, 1951 A. S. 419.

109 *Way*—Rights created by bounding on a part of grantor's land described as a road restated. *Teal* v. *Jagielo*, 1951 A. S. 349.

109 *Way*—Merged by common ownership and not recreated. *Howes v. Kelman*, 1951 A. S. 87.

142 *Adverse possession*—Title acquired by enclosing with a fence four feet of neighboring land. *Wood* v. *Quintin*, 1951 A. S. 1157.

161 *License*—For storage gasoline. After exercise as a grant attached to the land. *Adamsky* v. *City Council*, 1951 A. S. 101.

162 *Implied Easement*—Reserved, rule restated. *Krinsky* v. *Hoffman*. 1951, A. S. 75.

162 *Implied Easement*—Over driveway on land of the grantor to garage on land of grantee. *Hurley* v. *Guzzi*, 1952 A. S. 107.

166 *Easement Reserved—Highland Club of West Roxbury* v. *John Hancock Mutual Life Insurance Company*, 1951 A. S. 963.

180 *Laches*—Delay working disadvantage to another. See *Garfield* v. *Garfield*, 1951 A. S. 771.

336 *Deeds*—Stamps required after January 1, 1952. $1.00 if consideration exceeds $100 to $500 and 55 cents for each additional $500 or fraction thereof. Acts 1951 C. 710 adding Chap. 64D to G. L.

460 *Mortgage Discharge*—Marginal discharge no longer authorized after September 27, 1951. Acts 1951 C. 698 amending G. L. C. 183, S. 54.

536 *Foreclosure*—Mere inadequacy of price bid not bad faith. *Andover Savings Bank* v. *Basha*, 1951 A. S. 119.

626 *Escrow*—A case of delivery in escow. *Eckstrom* v. *Eckstrom*, 1951 A. S. 331.

628 *Recording*—Fee for deeds and mortgages, $5.00, 1951 C. 179 amending G.L. C. 262, S. 38.

Plans—Registers may make rules regarding size, etc., Acts 1951 C. 191.

649 *Acknowledgment*—Before out of state notary sufficient if his official seal affixed.

Date of Deed—Unimportance discussed. *Ashkenazy* v. *R. M. Bradley & Co.*, 1952 A. S. 51.

689 *Agreement for Sale*—Offer containing all the requisite details, accepted constitutes enforcible agreement though it called for executing a usual agreement upon acceptance. *Coan* v. *Holbrook*, 1951 A.S. 423.

699 *Sale*—No duty to disclose defects. *Swinton v. Whitinsville Savings Bank*, 311 Mass. 677 affirmed. *Spencer* v. *Gabriel*, 1951 A. S. 1021.

703 *Agreement for Sale*—From this case it would seem that when a seller accepts checks in place of cash called for by his agreement, he waives provision for cash and allows title to pass on delivery of the deed. *Casey* v. *Gallagher*, 1951 A. S. 143.

706 *Zoning*—Remedy of objectors to the action of the building inspector in granting a permit discussed. *Boyle* v. *Building Inspector*, 1951 A. S. 811.

706 *Zoning*—Non conforming use for stripping sand and gravel. *Seekonk* v. *Anthony*, 1952 A. S. 43.

706 *Zoning*—The Dover by-law allowing educational use if non-sectarian held invalid under Acts 1950, C. 325, S. 1. *Attorney General* v. *Dover*, 1951 A. S. 849.

706 *Zoning*—A permitted use must also comply with a valid regulation of the Board of Health. *Waltham* v. *Mignosa*, 1951 A. S. 453.

706 *Zoning*—Requirements of Board of Appeals decision. *Gaunt* v. *Board of Appeals of Methuen*, 1951 A. S. 607.

707 *Way*—In Veterans' housing development under motor vehicle liability law, see *General Accident Fire and*

Life Assurance Corporation Limited v. *Brow*, 1951 A. S. 427.

710 *Sale*—Where purchaser prior to time for performance informs seller he will not purchase, seller need not tender deed. *Schilling* v. *Levin*, 1951 A. S. 1023.

719 *Agreement for Sale*—As to the clause requiring the seller to use reasonable efforts to remove defects see, *Widebeck* v. *Gilbert Sullivan*, 1951 A.S. 661.

719 *Agreement for Sale*—The clause allowing the seller to return the deposit if he cannot make title does not protect a seller not acting in good faith who can secure a discharge of a mortgage. *Lafond, Jr.* v. *Frame*, 1951 A. S. 589.

721 *Return of Deposit*—And cessation of liability restated. *Prescott* v. *Germain*, 1950 A. S. 1143.

748 *Lease*—The provision for re-entry upon breach creates an estate upon condition. *Realty Developing Co.* v. *Wakefield Ready-Mixed Concrete Co.*, 1951 A. S. 777.

748 *Lease*—Clause providing for termination by the Lessor on a taking preventing Lessee obtaining damages—rule restated. *Sparrow Chemical Co.* v. *Boston*, 1951 A. S. 253.

804 *Administration*—Allowed up to 50 years, 1951 C. 163 but after January 1, 1952 such shall not, if more than 20 years have elapsed between the death and filing, affect rights under conveyances by heirs or under court proceedings recorded or filed before the petition for administration. C. 684 amending G.L. C. 193, S. 4.

838 *Sale by Executor*—Under direction to sell exercised twenty-six (26) years after the death. *Johnson* v. *Tacey*, 1951 A. S. 9.

875 *Tax Title*—Description referring to a plan in the Town Engineer's Office sufficient. *Lowell* v. *Borland*, 1951 A. S. 515.

878 *Taxation*—Of state or municipal property leased or occupied for other than public purposes. Acts 1951, C. 667 creating new S. 3A of GG.L., C. 59.

878 *Taxation*—Exemption of personal property to $5,000. Acts 1951, C. 640 amending S. 5 of C. 59 G.L.

878 *Taxation*—Exemptions for certain disabled veterans and families. 1951 C. 675 amending G.L. C. 59, S. 5, Clause 22.

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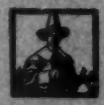

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